Docket for 03-475

(15)

No. 03-475 Status: GRANTED
Title: Richard B. Cheney, Vice President of the United States, et al., Petitioners
v.
United States District Court for the District of Columbia, et al.
Docketed: October 1, 2003
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (02-5354, 02-5355, 02-5356)
Decision Date: July 8, 2003
Rehearing Denied: September 10, 2003
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 30 2003	Petition for writ of certiorari filed. (Response due October 31, 2003)
Oct 30 2003	Brief of respondent Sierra Club in opposition filed.
Oct 31 2003	Brief of respondent Judicial Watch, Inc. in opposition filed.
Nov 12 2003	Reply of petitioner Richard B. Cheney, Vice President of United States, et al. filed.
Nov 12 2003	DISTRIBUTED for Conference of November 26, 2003.
Dec 1 2003	DISTRIBUTED for Conference of December 5, 2003.
Dec 8 2003	DISTRIBUTED for Conference of December 12, 2003.
Dec 15 2003	Petition GRANTED.
Feb 5 2004	Joint appendix filed. (Joint appendix in two volumes)
Feb 5 2004	Brief of petitioners Richard B. Cheney, Vice President of United States, et al. filed.
Feb 23 2004	Request of respondent Sierra Club for recusal of Justice Scalia received.
Mar 1 2004	In accordance with its historic practice, the Court refers the motion to recuse in this case to Justice Scalia.
Mar 2 2004	SET FOR ARGUMENT TUESDAY, APRIL 27, 2004.
Mar 3 2004	CIRCULATED.
Mar 11 2004	Brief of respondent Judicial Watch, Inc. filed. (Distributed)
Mar 11 2004	Brief of respondent Sierra Club. Distributed)
Mar 11 2004	Brief amicus curiae of Natural Resources Defense Council filed. (Distributed)
Mar 11 2004	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed. (Distributed)
Mar 11 2004	Brief amici curiae of American Association of Law Libraries, et al. filed. (Distributed)
Mar 16 2004	Record received from U.S.C.A. Dist. of Columbia Cir. (1 box)
Mar 18 2004	Memorandum of Justice Scalia filed.
Mar 26 2004	Motion for divided argument filed by respondents .
Apr 5 2004	Motion for divided argument filed by respondent GRANTED.
Apr 9 2004	Record received from U.S.D.C. - District of Columbia Circuit. (3 boxes, 1folder)
Apr 15 2004	Reply of petitioners Richard B. Cheney, Vice President of United States, et al. filed.

Supreme Court, U.S.
FILED

03 475 SEP 30 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
DAVID B. SALMONS
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
ERIC D. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, §§ 1 *et seq.*, can be construed, consistent with the Constitution, principles of separation of powers, and this Court's decisions governing judicial review of Executive Branch actions, to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	6
A. The decisions below work a wholesale expansion of FACA and conflict with this Court's decisions governing the separation of powers and judicial review of Executive Branch actions	8
1. The decisions below effectively eliminate constitutionally-necessary limits on FACA's reach	9
2. The expansion of FACA adopted below conflicts with this Court's cases interpreting the Constitution's separation of powers	13
3. The approach adopted below conflicts with this Court's cases governing judicial review of Executive Branch actions	17
B. The court of appeals' jurisdictional rulings conflict with this Court's cases and improperly immunize serious separation-of-powers violations from meaningful judicial review	21
Conclusion	25
Appendix A	1a
Appendix B	46a
Appendix C	50a
Appendix D	53a
Appendix E	124a
Appendix F	126a

TABLE OF AUTHORITIES

Cases: Page

Association of Am. Physicians & Surgeons, Inc. v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993) 5-6, 10, 12
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 18, 19
Dellums v. *Powell*, 561 F.2d 242 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977) 18
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 15, 20
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 20
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980) 16, 20
Nader v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) 21
Papandreou, In re, 139 F.3d 247 (D.C. Cir. 1998) 23, 24
Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440 (1989) 8, 12, 13, 14, 15, 16, 20, 21
Simplex Time Recorder Co. v. *Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985) 18
United States v. *Armstrong*, 517 U.S. 456 (1996) 17
United States v. *Chemical Found.*, 272 U.S. 1 (1926) 17
United States v. *Nixon*, 418 U.S. 683 (1974) 5, 23, 24
United States Postal Serv. v. *Gregory*, 534 U.S. 1 (2001) 17

Constitution, statutes, and regulations:

U.S. Const.:
Art. II 4, 13, 18
§ 2, Cl. 1 ..... 9, 16, 18
§ 3 ..... 9, 16, 18
Administrative Procedure Act, 5 U.S.C. 706 19
Federal Advisory Committee Act, 5 U.S.C. App. 1 ..... 2, 126a
§ 3(2), 5 U.S.C. App. 2 ..... 9, 11, 127a

Statutes and regulations—Continued: Page

§ 9(a), 5 U.S.C. App. 5 ..... 11, 130a
§ 10(d), 5 U.S.C. App. 6 ..... 21, 133a
28 U.S.C. 1291 5
41 C.F.R.:
Section 101-6.1003 (2000) 6, 11
Section 102-3.25 12

Miscellaneous:

Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994) 8
66 Fed. Reg. (2001):
p. 37,728 12
p. 37,734 12
NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* (2001) (*available at* <www.whitehouse.gov/energy/National-Energy-Policy pdf>) 3, 19

In the Supreme Court of the United States

No.

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Richard B. Cheney, Vice President of the United States, the former National Energy Policy Development Group (NEPDG), and former members and staff of the NEPDG, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 334 F.3d 1096. The orders of the district court (App., *infra*, 46a-52a) are unreported, although its earlier opinion in this case (*id.* at 53a-123a) is reported at 219 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on

September 10, 2002 (App., *infra*, 124a-125a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 1, are reproduced in Appendix F, *infra*, 126a-134a.

STATEMENT

1. President Bush established the NEPDG as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. See C.A. App. 117. The President named the Vice President to preside over meetings and direct the work of the NEPDG and ordered that the membership of the NEPDG shall "consist[] of * * * the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs." *Id.* at 117-118. The President also authorized the Vice President to invite the Chairman of the Federal Regulatory Commission, the Secretary of State, and "as appropriate, other officers of the Federal Government" to participate in the work of the NEPDG. *Id.* at 118. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Ibid.* It was directed to "gather information,

deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.*

On May 16, 2001, the NEPDG issued a public report containing a set of recommendations to enhance energy supplies and encourage conservation. See NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* (*NEPDG Report*) at iii (*available at* <www.whitehouse.gov/energy/National-Energy-Policy.pdf>). The report included a list of the members of the NEPDG. *Id.* at v. In accordance with the President's January 2001 memorandum, C.A. App. 117-118, all of the members identified in the NEPDG Report were "officers of the Federal Government." Indeed, the NEPDG members identified in the Report were precisely the same cabinet-level officials and assistants to the President named in the President's memorandum. The NEPDG was terminated on September 30, 2001. *Id.* at 119, 257-258.

2. Plaintiffs Judicial Watch, Inc. and Sierra Club filed these consolidated actions against the Vice President, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG included private citizens as unofficial de facto members and so the NEPDG was an advisory committee subject to FACA and all its disclosure requirements. Plaintiffs requested access to NEPDG documents and a declaration that the defendants violated FACA. C.A. App. 35-36, 48, 113-115. The government filed motions to dismiss, which the district court granted in part and denied in part. App., *infra*, 121a.

The court recognized that FACA itself provides no private right of action, but it held that the statute is enforceable through either the Administrative Procedure Act (APA) or mandamus. App., *infra*, 73a-97a.

The court recognized that the Vice President is not an "agency" within the meaning of the APA, *id.* at 78a-79a, but, without deciding the question, left open the prospect that the Vice President could be sued through mandamus and therefore kept the Vice President in this litigation, *id.* at 96a-97a. It also deferred ruling on the government's contention that applying FACA to the NEPDG would violate the separation of powers and interfere with core Article II prerogatives. *Id.* at 97a-119a. Although the court acknowledged "the seriousness of the constitutional challenge raised by defendants," *id.* at 98a, and recognized that discovery could raise related constitutional questions, *id.* at 118a, it nonetheless allowed discovery to proceed in the hope that it might obviate the need to resolve the constitutional questions, *id.* at 97a-119a.

The court directed plaintiffs to submit a proposed discovery plan, which it approved on August 2, 2002, directing the government to "fully comply with" plaintiffs' discovery requests or "file detailed and precise objections to particular requests." App., *infra*, 50a-51a. Among other things, the district court approved the plaintiffs' request for the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and outside individuals. See, *e.g.*, C.A. App. 246, 251, 253.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established procedure that would be applicable in a suit under the APA. In addition, the government submitted an affidavit of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." C.A. App. 257, 260-262. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees. See *id.* at 261-262. The district court denied the government's motion for a protective order, App., *infra*, 47a, and forbade the government to file a motion for summary judgment pending further order of the court, C.A. App. 264.

3. The Vice President and the other defendants filed a petition for writ of mandamus, asking the court of appeals to vacate the district court's discovery orders, direct the district court to decide the case on the basis of the administrative record and any supplemental affidavits that the court might require, and dismiss the Vice President as a defendant. The Vice President also filed a notice of appeal, invoking the court's appellate jurisdiction under 28 U.S.C. 1291, see *United States* v. *Nixon*, 418 U.S. 683 (1974).

A divided panel of the court of appeals denied relief. The panel majority held that it lacked jurisdiction to issue a writ of mandamus because the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President "can be fully addressed, untethered by anything we have said here, on appeal following final judgment." App., *infra*, 19a. The court dismissed the Vice President's appeal for lack of jurisdiction, holding that the absence of any claim of executive privilege in this case rendered *Nixon*, *supra*, inapposite. *Id.* at 23a.

Judge Randolph dissented. He criticized the majority's reliance on the holding in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898,

915 (D.C. Cir. 1993) (*AAPS*), that an outside consultant may "be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members." App., *infra*, 31a, 34a. That holding, Judge Randolph argued, makes "extensive discovery into the Executive Office of the President * * * inevitable." *Id.* at 35a. Judge Randolph concluded that "[f]or the judiciary to permit this sort of discovery, authorized in the name of enforcing FACA—a statute providing no right of action * * *—strikes me as a violation of the separation of powers." *Id.* at 37a. In order to avoid the constitutional difficulties that *AAPS* creates, Judge Randolph urged reliance on a General Services Administration regulation that, during the time period relevant to this case, defined "committee member" to mean "an individual who serves by appointment on a committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." See *id.* at 42a-44a (quoting 41 C.F.R. 101-6.1003 (2000)).

4. On September 10, 2003, the court of appeals denied rehearing en banc, with Judges Randolph, Sentelle, and Roberts dissenting and Judge Henderson noting her recusal. App., *infra*, 124a-125a.

REASONS FOR GRANTING THE PETITION

These cases present fundamental separation-of-powers questions arising from the district court's orders compelling the Vice President and other close presidential advisors to comply with broad discovery requests by private parties seeking information about the process by which the President received advice on important national policy matters from his closest advisors. Those orders subject the Vice President and

other senior presidential advisors to discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself, in order to determine whether FACA even applies. They do so, moreover, based solely on an unsupported allegation in a complaint that the NEPDG included unauthorized de facto members—an allegation that is contradicted by the President's order creating the NEPDG, by the NEPDG's published report, and by a declaration by a top NEPDG staff person, all of which confirm that there were no non-governmental NEPDG members, de facto or otherwise.

Any construction of the FACA that would permit discovery of the Vice President and other presidential advisors in such circumstances would violate fundamental principles of the separation of powers. The court of appeals exacerbated those separation-of-powers problems by holding that it lacked mandamus and appellate jurisdiction because the orders are discovery orders that generally cannot support immediate appellate review. But those orders are far from ordinary discovery orders. They would subject the President to intrusive and distracting discovery every time he seeks advice from his closest advisors. They would open the way for judicial supervision of internal Executive Branch deliberations. Moreover, in the context of a statute that this Court has recognized raises serious constitutional concerns in large measure because of its disclosure requirements, it is no answer to say that discovery orders that are more extensive than the disclosure triggered by a statutory violation do not raise serious and ripe constitutional issues. As Judge Randolph explained in his dissenting opinion: "As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge

of constitutionality. The decision in this case pushes it over." App., *infra*, 31a (citing Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994)).

While this Court has recognized the constitutional difficulties presented by FACA and has interpreted it to avoid constitutional problems, see *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989), the decisions by the panel and the district court will routinely generate the kind of intrusions into the Executive Branch that this Court has sought to avoid. The decision below also conflicts with this Court's decisions governing judicial review of Executive Branch actions. Plenary review by this Court is warranted to resolve those conflicts and to ensure that FACA does not intrude on the President's vital interests in receiving unregulated and uninhibited advice from his closest advisors or on the unique relationship between the President and the Vice President.

A. The Decisions Below Work A Wholesale Expansion Of FACA And Conflict With This Court's Decisions Governing The Separation Of Powers And Judicial Review Of Executive Branch Actions

Throughout this litigation, the Vice President has respectfully but resolutely maintained that, in the circumstances of this case, the legislative power and judicial power cannot extend to compelling a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President, heads of departments and agencies, and assistants to the President in the President's exercise of powers committed exclusively to the President by the Constitution, specifically by the Recommendations and Opinions Clauses. See

U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. The district court recognized the seriousness of those concerns, but then ordered sweeping discovery raising equally serious separation-of-powers problems, and the court of appeals' decision immunizes those separation-of-powers violations from effective review. By working an unprecedented and unwarranted expansion of FACA and disregarding established principles of judicial review of Executive Branch actions, as well as interbranch comity, the decisions of the court of appeals and district court threaten substantial interference with vital Executive Branch functions.

1. The Decisions Below Effectively Eliminate Constitutionally-Necessary Limits On FACA's Reach

The orders of the court of appeals and the district court find no basis in FACA's text or purposes. Rather, they are clearly premised on the view that FACA and its disclosure requirements apply to an advisory group established by the President to consist only of full-time government employees, if the "de facto" membership deviates from that established by the President. Those decisions effectively undermine Congress's judgment that FACA is not to be applied to a group established by the President and composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 2, § 3(2). That provision reflects Congress's own effort to limit the separation-of-powers difficulties inherent in FACA. Nevertheless, the decisions below engender those difficulties by eliminating this key textual protection as a practical matter by ordering discovery obligations at least as onerous as the disclosure obligations imposed by FACA—all upon the mere allegation that, contrary to the President's express

directive and the group's own report, there was a non-governmental member of the committee. Under the court of appeals' approach, the President and Vice President would be subject to discovery any time they sought advice from their advisors, even where, as here, the President seeks the benefits of confidential advice only from his closest advisors and expressly structures the process so that FACA does not apply. Nothing in FACA supports such a result.

Both the court of appeals and the district court based their holdings effectively repealing FACA's textual exemption for advisory groups made up exclusively of governmental officials—an exception that is necessary to avoid unconstitutional interference with the Executive—on the notion adopted by the District of Columbia Circuit in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (1993) (*AAPS*), that an advisory committee could include "de facto" members. In *AAPS*, the court of appeals held that courts could look beyond formal membership to determine whether persons formally designated as "consultants" to working groups associated with First Lady Hillary Clinton's health care task force "may still be properly described as * * * member[s] of an advisory committee," because their "involvement and role are functionally indistinguishable from those of the other members." *Id.* at 915. The decisions below extend *AAPS* beyond the advisory process at issue there, which was expressly designed to include non-governmental advisors, to a committee formally established by the President as composed exclusively of government officials.

The notion of de facto membership applied below has no support in FACA's text. See App., *infra.*, 31a-38a (Randolph, J., dissenting). FACA plainly envisions only advisory committees "established or utilized by the

President" or an agency, 5 U.S.C. App. 2, § 3(2), and it expressly forbids the establishment of an advisory committee "unless such establishment is," *inter alia*, "specifically authorized by statute or by the President," 5 U.S.C. App. 5, § 9(a). Thus, by its terms, FACA recognizes that the question whether an advisory group established by the President is subject to the statute's disclosure and reporting requirements is principally determined by the group's formal structure as established by the President. Here, the record is clear that the NEPDG, as "established" by the President, was comprised wholly of government officials and employees.

In contrast to the clear implication of FACA's text, the de facto member doctrine applied below makes the President's memorandum establishing the NEPDG largely irrelevant to the question of FACA's applicability. By so doing, that doctrine also conflicts with the relevant General Services Administration regulation, 41 C.F.R. 101-6.1003 (2000), which makes clear that whether a presidential advisory group is subject to FACA turns on the formal structure given it by the President, not on some loose notion of de facto membership.[1] Moreover, as Judge Randolph explained in his dissent below—and as this case amply demonstrates—

---

[1] At the time the President formed the NEPDG, the GSA regulation defined "*Committee member*" to mean "an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." 41 C.F.R. 101-6.1003 (2000). Effective August 20, 2001, the GSA revised the "*Committee member*" definition to read "an individual who serves by appointment or invitation on an advisory committee or subcommittee." 66 Fed. Reg. 37,728, 37,734 (2001) (codified at 41 C.F.R. 102-3.25).

the de facto member doctrine as applied below *inevitably* leads to constitutionally problematic discovery into the process by which the President receives advice from his closest advisors any time a plaintiff alleges that the committee's membership deviated materially from that established by the President. App., *infra*, 31a-38a, 43a-45a.

In the particular context of FACA, such discovery, far from being a preliminary step in determining the existence of a violation or the propriety of a remedy, is essentially indistinguishable—both in practical effect and in separation-of-powers difficulties—from the final relief that would follow from an adjudicated violation. That is especially true of an alleged FACA committee that has terminated, because prospective compliance with FACA's other requirements is impossible and the only potential remedy is disclosure of past proceedings. In short, while application of FACA to close presidential advisors has long raised significant separation-of-powers concerns—as this Court unanimously recognized in *Public Citizen*, see 491 U.S. at 466-467, 486-489—the court of appeals' construction of an extra-statutory de facto member doctrine and its green light for discovery upon the mere allegation of such de facto members plainly "push[] [FACA] over" the constitutional edge. App., *infra*, 31a (Randolph, J., dissenting).[2]

[2] To be sure, no other court of appeals has expressly disagreed with the District of Columbia Circuit's approach in *AAPS*, *supra*, or the decision below. However, there is no impediment to bringing such actions in the District for the District of Columbia, and as the decisions below ensure that the mere allegation of de facto membership entitles the plaintiff to the same effective remedies as those that would apply in a final judgment, there is no reason for litigants to file suit anywhere else. In any event, the conflicts between the decisions below and this Court's precedents, discussed *infra*, are more than sufficient to warrant plenary review.

2. The Expansion Of FACA Adopted Below Conflicts With This Court's Cases Interpreting The Constitution's Separation of Powers

Contrary to the approach taken by the court of appeals and the district court in this case, this Court in *Public Citizen*, *supra*, went to great lengths to impose limits on FACA to avoid an unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. This case implicates analogous—and, indeed, even more serious—separation-of-powers difficulties with the same statute. It therefore presents substantial questions warranting review.

Indeed, the court of appeals' approach is flatly at odds with the approach taken by this Court in *Public Citizen*. At issue in *Public Citizen* was the President's practice of having the Department of Justice seek advice from the Standing Committee on Federal Judiciary of the American Bar Association (ABA) to assist the President in fulfilling his constitutional duty to nominate and appoint federal judges. The plaintiffs in that case alleged that the ABA consultations were subject to the disclosure and other requirements of FACA because the Executive "utilized" the ABA committee as a non-governmental advisory group.

This Court disagreed. Although the Court acknowledged that the Executive may have "utilized" the ABA committee "in one common sense of the term," it recognized that adopting a broad understanding of the statute would raise significant separation-of-powers concerns, since "it would extend FACA's requirements to any group of two or more persons, or at least any

formal organization, from which the President or an Executive agency seeks advice." *Public Citizen*, 491 U.S. at 452; see *id.* at 466-467. As the Court explained, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Id.* at 453.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, concurred separately.[3] The concurring Justices agreed that "it is quite desirable not to apply FACA to the ABA Committee," but they concluded that "as a matter of fair statutory construction" there was no way to avoid that result. *Public Citizen*, 491 U.S. at 481. Instead, they would have held that application of FACA in the context of that case violated constitutional separation-of-powers principles. See *id.* at 482 ("The essential feature of the separation-of-powers issue in this suit, and the one that dictates the result, is that this application of the statute encroaches upon a power that the text of the Constitution commits in explicit terms to the President."). The concurring Justices explained that "[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution," as had the President's nomination and appointment power, "the balance already has been struck by the Constitution itself," and the other Branches have no authority to regulate the exercise of that power. *Id.* at 486. Thus, "[t]he mere fact that FACA would regulate so as to interfere with

[3] Justice Scalia took no part in the decision. *Public Citizen*, 491 U.S. at 467.

the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act." *Id.* at 488-489.

This case involves the same statute and raises the same separation-of-powers concerns involved in *Public Citizen* and does so in a context in which the interference with the President is far more direct and the construction of the statute that avoids such difficulties is far more obvious. Both opinions in *Public Citizen* make clear that the construction of FACA adopted below is unconstitutional. Unlike the Executive's use of the ABA committee in *Public Citizen*, which did fit within the ordinary terms of the statute, the de facto member doctrine, especially as applied in this case, is inconsistent with FACA's text. Moreover, while the ABA committee in *Public Citizen* concededly involved individuals outside the government, here there is no basis in the record to suspect that a committee established by the President to consist exclusively of the Vice President, heads of departments, and assistants to the President in fact involved any "unofficial," non-governmental members. If the mere allegation of an unofficial, non-governmental member is enough to trigger discovery obligations roughly co-extensive with the available remedies for a FACA violation, then the textual exemption of advisory groups including only government officials, which is essential to the statute's constitutionality, has little or no practical effect. Thus, the decisions below will routinely generate the kind of intrusions that this Court sought to avoid in *Public Citizen* and other cases. Cf. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992) (holding that absent "an express statement by Congress," Court would not construe the APA's definition of "agency" as an

"authority of the Government of the United States" to include the President); *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that telephone notes made by Henry Kissinger while he was serving as Assistant to the President were not "agency records" under the Freedom of Information Act's broad definition of agency to include "any * * * establishment in the executive branch of the Government (including the Executive Office of the President)").

It is equally clear that FACA, as interpreted below, is unconstitutional under the three-Justice concurring opinion in *Public Citizen*. See 491 U.S. at 467-489. The President organized the NEPDG to assist him in the exercise of his exclusive authority under the Constitution to "require" opinions from his advisers and to prepare "Measures" that he might recommend to Congress. U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. Just like the appointment power at issue in *Public Citizen*, the authority to require opinions from his advisors and to recommend measures to Congress are "power[s] that the text of the Constitution commits in explicit terms to the President." 491 U.S. at 482. Accordingly, "[t]he mere fact" that FACA, as construed below, "would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his dut[ies] assigned under the Constitution * * * is enough to invalidate the Act." *Id.* at 488-489.

3. The Approach Adopted Below Conflicts With This Court's Cases Governing Judicial Review Of Executive Branch Actions

The decisions below also conflict with decisions of this Court affording a presumption of regularity to executive action and limiting discovery in APA and mandamus actions. Those conflicts likewise warrant this Court's review.

1. By ordering unprecedented and constitutionally troubling discovery against the Vice President based only on an unsupported—and, in fact, contradicted—allegation that the group he chaired to assist the President was not constituted as the President expressly directed and the group itself reported, the district court turned the traditional presumption of regularity applicable to Executive Branch actions on its head. Indeed, the district court did so expressly, basing its sweeping discovery orders on its suspicion that "the government doesn't always comply with the law." C.A. App. 217 (Tr. of Aug. 2, 2002 Hearing).

That approach directly conflicts with this Court's holding that "*in the absence of clear evidence to the contrary*, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926)) (emphasis added); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). As this Court explained in *Armstrong*, the presumption of regularity "rests in part on an assessment of the relative competence" of Executive Branch officials and courts, as well as on "a concern not to unnecessarily impair the performance of a core executive constitutional function." 517 U.S. at 465. Here, both of those concerns warrant strict

adherence to the presumption of regularity. The President and the Vice President, for example, are in the best position to know whether the NEPDG's advisory activities were structured to fall within FACA's disclosure requirements and whether disclosure would chill necessary candor by the President's advisors. And, for the reasons explained above, disclosure in this context would interfere with the President's exercise of "core executive constitutional function[s]," *ibid.*, specifically his powers to "require" opinions from his advisers and to prepare "Measures" that he might recommend to Congress. U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3.[4]

2. Similarly, the court of appeals and the district court failed to appreciate the significance of the district court's determination that FACA does not provide a cause of action and so that an action to enforce FACA can proceed, if at all, only as an APA or mandamus action. Accordingly, their decisions are inconsistent with this Court's holding that judicial review under the APA is generally based on an administrative record, not on discovery. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971). The record in this case makes clear that the NEPDG was established as a group of high-ranking government

[4] In addition, the plaintiffs have not demonstrated any heightened showing of need, as is usually necessary—although often not sufficient—to obtain discovery into Executive Branch decisionmaking. See *Dellums* v. *Powell*, 561 F.2d 242, 245-249 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977); *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). As the record amply reflects, the President assigned the Vice President and the other members of the NEPDG the responsibility to fulfill core Executive Branch functions under Article II of the Constitution. In this context, especially, such principles of interbranch comity should preclude discovery against the President or Vice President.

officials and that it consisted only of those officials. The President's memorandum establishing the NEPDG appointed only federal officials as members and made clear that only "officers of the Federal Government" could be invited to participate. C.A. App. 117-118. Consistent with that directive, the NEPDG's final report lists only federal officials as members. See *NEPDG Report* at v; see also C.A. App. 93 (letter from David Addington, Counsel to the Vice President, to plaintiffs' counsel explaining that all of NEPDG's members were federal employees); *id.* at 261-262 (Knutson Declaration describing group membership).[5]

In addition, any review under mandamus could be no more intrusive than that under the APA. Indeed, the lower courts' treatment of the mandamus issue underscores their failure to appreciate the separation-of-powers difficulties inherent in ordering discovery

[5] *Overton Park* indicates that in certain circumstances in an APA action a further explanation by the agency may be appropriate to fill in a "gap" in the administrative record. See 401 U.S. at 419-421. But such a gap exists only where the record taken as a whole would not permit review of the agency action under 5 U.S.C. 706. Here, review is not available under Section 706, and in any event, there is no "gap." Both the President's memorandum establishing the NEPDG and the NEPDG's report speak clearly to the issue of the group's membership, and both confirm that its only members were federal officials. Indeed, any conceivable "gap" stems only from plaintiffs' unsupported allegation that somewhere there is a document that shows that the President was disobeyed and private individuals were somehow permitted to serve as NEPDG members. Such baseless allegations, however, could always be made to suggest a "gap" in any administrative record. Contrary to the court of appeals' suggestion (App., *infra*, 11a), nothing in *Overton Park* suggests that, even in an APA action, a further explanation by appropriate officials—much less discovery —would be appropriate based on such allegations. See *id.* at 38a-39a (Randolph, J., dissenting).

against the Vice President in the context of a statute that is constitutionally problematic precisely because it envisions the disclosure of the process by which the President's closest advisors furnish advice to the President. The district court recognized that FACA does not provide a cause of action and that the APA does not reach the Vice President. App., *infra*, 73a-79a. Despite this Court's cases limiting remedies not provided by Congress, see, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002), the district court entertained the possibility of a mandamus remedy against the Vice President. Rather than definitely deciding whether the Vice President should remain in the case, however, it ordered extensive discovery in the hope that it could avoid deciding the difficult issues. But in the FACA context, such discovery creates rather than avoids difficult separation-of-powers concerns.

The approach adopted below stands in stark contrast not only to this Court's decision in *Public Citizen*, discussed above, but also to the approach adopted by this Court in *Franklin* v. *Massachusetts*, *supra*, and *Kissinger* v. *Reporters Committee for Freedom of the Press*, *supra*. In each of those cases, this Court took pains to construe broad statutory language regulating and requiring disclosure of Executive Branch communications to avoid direct interference with the President and his closest advisors. By requiring the Vice President to comply with broad-ranging discovery requests based on the mere assumption (and a mistaken one at that) that mandamus lies against the Vice President in this context, the courts below have invited the very separation-of-powers concerns this Court has so consistently sought to avoid.

B. The Court Of Appeals' Jurisdictional Rulings Conflict With This Court's Cases And Improperly Immunize Serious Separation-Of-Powers Violations From Meaningful Judicial Review

1. The court of appeals also erred in holding that it lacked jurisdiction to issue a writ of mandamus because the dispute was, in its view, premature. This case self-evidently involves more than an ordinary discovery dispute. Not only does this case involve intrusive and distracting discovery against the Vice President himself, but it arises in the context of FACA, in which this Court has recognized the separation-of-powers concerns presented by FACA's obligations, which are not meaningfully different from the discovery orders themselves. The distraction caused by the discovery orders that will become an inevitable feature of the scheme created by the lower courts will provide ample incentives for some to file these lawsuits. The outcome of the lawsuits will largely be beside the point, as the remedy for a proven FACA violation is not materially different from a discovery order—either in real-world effect or in the separation-of-powers concerns raised.

The procedural posture of this case in no way renders petitioners' separation-of-powers concerns premature. In *Public Citizen*, *supra*, this Court unanimously viewed the obligations imposed by FACA as giving rise to serious separation-of-powers concerns even if they were imposed as a result of a final judgment with all the attendant protections. Here, by contrast, the upshot of the decisions below is that effectively the same remedies imposed upon a final adjudication of a violation—with the same separation-of-powers difficulties—will be triggered by the mere allegation that a committee's membership deviated in practice from that established by the President. The imposition of such problematic

disclosure requirements upon mere allegations, far from rendering separation-of-powers problems premature, only exacerbates them.

Contrary to the court of appeals' decision (App., *infra*, 13a, 15a), the fact that petitioners have not yet asserted privilege over the documents subject to discovery does not render the separation-of-powers problems associated with those orders either "premature" or "hypothetical." Rather, the intrusive discovery ordered below violates the separation of powers without regard to whether privilege could or would be asserted. That is made clear in this Court's decision in *Public Citizen*. There, this Court unanimously recognized the serious separation-of-powers concerns raised by FACA, even though no privilege claim had been asserted. See 491 U.S. at 466-467, 486-489; cf. *Nader* v. *Baroody*, 396 F. Supp. 1231, 1234 & n.5 (D.D.C. 1975) (holding that fact that President had not asserted privilege "misses the point" of separation-of-powers concern).[6]

Nor can the Vice President's separation-of-powers objections be adequately addressed by the district court on remand or by appeal after final judgment, because the very essence of those objections is that *any* discovery—let alone discovery tantamount to relief for a violation—in the context of the record in this case

[6] In this regard as well, the disclosure provided by the discovery orders mirrors the relief provided for a violation of the statute. FACA itself preserves the ability of the President or the head of a committee to close meetings to the public, see 5 U.S.C. App. 6, § 10(d), and privilege claims could preserve material from disclosure in a suit filed against a terminated committee. Accordingly, the relief ordered below is not materially different from the relief that could be ordered in a final judgment and so there is no reason to postpone plenary review until a final judgment issues.

would violate the separation of powers. Thus, the concerns here are separate from and antecedent to any claims of privilege. The court of appeals' refusal even to assert jurisdiction over these claims before an assertion of privilege is itself an erroneous decision, which merits this Court's review. The decision below would limit the Executive's ability to obtain appellate review of separation-of-powers claims that are distinct from privilege claims, unless and until privilege is invoked. That illogical requirement erects an enormous obstacle to vindicating the proper functioning of the separation of powers.[7]

2. For similar reasons, the court of appeals' denial of jurisdiction over the Vice President's appeal and its attempt to distinguish *United States* v. *Nixon*, 418 U.S. 683 (1974), are also mistaken. The majority's reading of *Nixon* as requiring the assertion of a privilege claim before an appeal may be permitted (App., *infra*, 24a-25a) is illogical. Where, as here, the separation-of-powers arguments do not take the form of—and are logically antecedent to—a privilege claim, it serves no purpose to require the President or Vice President to

[7] Indeed, the panel majority itself recognized that petitioners' separation-of-powers arguments are both broader than and antecedent to any specific future claims of privilege, see App., *infra*, 15a (characterizing petitioners' separation-of-powers argument as more like an "immunity" than a privilege), but then failed to recognize the jurisdictional consequence of that observation. As the court of appeals had previously held, an "immunity claim has special characteristics beyond those of ordinary privilege. The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

assert privilege claims before permitting an interlocutory appeal.

In any event, *Nixon* did not turn on the assertion of privilege, but on separation-of-powers concerns raised by forcing the President to submit to contempt proceedings merely to facilitate timely review. This Court held that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate" in a case involving the President. 418 U.S. at 691. "To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." *Id.* at 691-692. Moreover, the Court held, "a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review." *Id.* at 692. Those same considerations support permitting an appeal here by the Vice President (or, at a minimum, providing appellate review on the merits to constitutional objections raised by the Vice President). Cf. *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (citing *Nixon* and stating that "[m]andamus has been recognized as an appropriate shortcut when holding a litigant in contempt would be problematic").

The court of appeals did not question that the unique role of the Vice President under the Constitution places him within the *Nixon* exception to the contempt requirement. Nevertheless, under its approach, the only way that the Vice President can obtain appellate review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery on remand, suffer the indignity of a contempt citation, and appeal the order holding him in contempt. Such an

approach is clearly inconsistent with *Nixon*, not to mention the separation of powers established by the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
DAVID B. SALMONS
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
ERIC D. MILLER
Attorneys

SEPTEMBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Nos. 02-5354, 02-5355 & 02-5356

IN RE: RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

Argued: Apr. 17, 2003
Decided: July 8, 2003

Before: EDWARDS, RANDOLPH and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge TATEL. Concurring opinion filed by Circuit Judge EDWARDS. Dissenting opinion filed by Circuit Judge RANDOLPH.

TATEL, Circuit Judge:

The Vice President of the United States and others, all defendants in this suit under the Federal Advisory Committee Act, petition for a writ of mandamus vacating the district court's discovery orders, directing the district court to rule on the basis of the administrative record, and ordering dismissal of the Vice President as a party. Petitioners, however, have failed to satisfy the heavy burden required to justify the extraordinary remedy of mandamus: Their challenges to the district court's legal rulings can be fully considered on appeal following final judgment, and their claims of harm can, at least at this stage of the litigation, be fully cured in the district court. We therefore dismiss the petition. The Vice President has also filed an interlocutory ap-

peal from the district court's rulings. We lack jurisdiction to entertain that appeal: The collateral order doctrine does not apply, nor does *United States v. Nixon*, where the Supreme Court entertained an interlocutory appeal because, unlike here, the district court had rejected a claim of executive privilege.

I.

Shortly after his inauguration, President George W. Bush issued a memorandum establishing the National Energy Policy Development Group (NEPDG), a task force charged with "develop[ing] . . . a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." Mem. Establishing National Energy Policy Development Group, Jan. 29, 2001. Established within the Office of the President and chaired by Vice President Richard B. Cheney, the task force consisted of six cabinet secretaries, as well as several agency heads and assistants to the President. *Id.* The memorandum authorized the Vice President to invite "other officers of the Federal Government" to participate "as appropriate." *Id.* Five months later, the NEPDG issued a final report recommending a set of energy policies. *See* NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY: REPORT OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP (2001), *available at* http://www.whitehouse.gov/energy/National-Energy-Policy. pdf.

On July 16, 2001, Judicial Watch, a nonprofit organization that seeks "to promote and protect the public interest in matters of public concern," Second Am. Compl. ¶ 3 (Judicial Watch Compl.), filed suit in the

United States District Court for the District of Columbia against the NEPDG, the Vice President, other federal officials, and several private individuals, alleging that the NEPDG had failed to comply with the procedural requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. Enacted to "control the growth and operation of the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government,'" *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 902-03 (D.C. Cir. 1993) (*AAPS*) (quoting 5 U.S.C. App. 2, § 2(a)), FACA requires advisory committees to make public all reports, records, or other documents used by the committee, provided they do not fall within any Freedom of Information Act exemptions. Central to this case, FACA section 3(2) exempts advisory committees "composed wholly of full-time officers or employees of the Federal Government." 5 U.S.C. App. 2, § 3(2)(iii).

Although the President appointed only federal government officials to the NEPDG and authorized the Vice President to add additional "federal officials," Judicial Watch alleges that "non-federal employees, including Thomas Kuhn, Kenneth Lay, Marc Racicot, Haley Barbour, representatives of the Clean Power Group, and other private lobbyists . . ., regularly attended and fully participated in non-public meetings of the NEPDG as if they were members of the NEPDG, and, in fact, were members of the NEPDG." Judicial Watch Compl. ¶ 25; *see AAPS*, 997 F.2d at 915 (holding that the section 3(2) exemption does not apply if non-government officials' "involvement and role are functionally indistinguishable from those of the other mem-

bers"). Brought pursuant to both the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the All Writs Act, 28 U.S.C. § 1361, the complaint sought, among other things, a judgment declaring the defendants to be in violation of FACA and an order directing them to provide plaintiffs "a full and complete copy of all records . . . made available to or prepared for Defendant NEPDG," as well as "detailed minutes of each meeting of Defendant NEPDG . . . that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all report[s] received, issued, or approved by Defendant NEPDG." Judicial Watch Compl. at 22.

Before proceedings commenced in the district court, the Sierra Club, a nonprofit group seeking "to practice and promote the responsible use of the Earth's resources and ecosystems," filed a virtually identical lawsuit in the United States District Court for the Northern District of California. Compl. ¶ 3. The Sierra Club's suit was subsequently transferred to the district court here and consolidated with Judicial Watch's.

All defendants moved to dismiss, arguing, among other things, that FACA does not authorize a private cause of action, that the Vice President cannot be sued under the APA, and that "[a]pplication of FACA to the NEPDG's operations would directly interfere with the President's express constitutional authority including his responsibility to recommend legislation to Congress and his power to require opinions of his department heads." Mem. in Support of Mot. to Dismiss at 3 (D.D.C. Mar. 8, 2002). Amplifying this latter point, defendants argued that "such an expansive reading of FACA would encroach upon the President's constitutionally protected interest in receiving confidential ad-

vice from his chosen advisers, an interest that is also rooted in the principle of separation of powers." *Id.* Although the district court agreed that no private cause of action exists under FACA and recognized that the Vice President cannot be sued under the APA, it ruled that FACA could be enforceable through mandamus. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 42 (D.D.C. 2002). Relying on the "fundamental principle of constitutional interpretation that a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it," *id.* at 45, the district court deferred ruling on the government's separation of powers claim, explaining that "after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA [to the Vice President]," *id.* at 54-55. The court observed that, "while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here." *Id.* at 55.

After denying defendants' motion to dismiss, the district court approved plaintiffs' discovery plan and directed the government to "fully comply with the[ ] requests," "file detailed and precise objections to particular requests," or "identify and explain their invocations of privilege with particularity." Order Approving Disc. Plan at 2 (D.D.C. Aug. 2, 2002). In response and on behalf of all federal defendants except the Vice President, the government produced some 36,000 pages of documents. On behalf of the Vice President, the government filed a motion for a protective order, arguing

that discovery against the Vice President would violate the separation of powers and seeking permission to file a motion for summary judgment based on the "administrative record." According to the government, the administrative record consists of the President's memorandum creating the NEPDG, the NEPDG's final report, and an affidavit by Karen Knutson, Deputy Assistant to the Vice President for Domestic Policy. Submitted with the motion for a protective order, Ms. Knutson's affidavit declares that "[t]o the best of my knowledge, no one other than the officers of the Federal Government who constituted the NEPDG, the Federal employees whom they chose from their respective departments, agencies and offices to accompany them (all of whom were full-time Federal employees), and the Office of the Vice President personnel set forth above, attended any of the [NEPDG] meetings." Knutson Aff. ¶ 10.

Although the district court acknowledged that "[i]n APA cases, discovery is normally frowned upon," it stated that it would not consider a motion for summary judgment until after discovery, explaining that "this case isn't the typical case, where you have a significant administrative record." Tr. of Status Hr'g at 13:17-23 (D.D.C. Aug. 2, 2002). The court therefore denied the government's motion for a protective order and directed defendants to "produce non-privileged documents and a privilege log." Order Den. Mots. for Recons. and Protective Order at 1 (D.D.C. Oct. 17, 2002). The court informed the parties that it was considering either reviewing allegedly privileged information in camera or appointing a special master, such as a retired judge, to review privilege claims. Tr. of Omnibus Mots. Hr'g at 4:15-5:12 (D.D.C. Oct. 17, 2002).

Instead of responding to plaintiffs' discovery requests and filing a privilege log, defendants asked the district court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court declined, Mem. Op. and Order (D.D.C. Nov. 27, 2002), and defendants filed in this court an emergency motion for writ of mandamus pursuant to 28 U.S.C. § 1651 seeking an order "vacat[ing] the discovery orders issued by the district court, direct [ing] the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct[ing] that the Vice President be dismissed as a defendant." Emergency Pet. for Writ of Mandamus at 20. The Vice President also filed a notice of appeal from the district court's order denying the motion to dismiss and from the various discovery orders. Plaintiffs opposed the mandamus petition and filed a motion to dismiss the interlocutory appeal. We granted an administrative stay and heard oral argument on April 17, 2003.

Now before us are the petition for a writ of mandamus and the plaintiffs' motion to dismiss the appeal. We address each in turn.

II.

In considering the petition for a writ of mandamus, we are bound by well-established rules of both the Supreme Court and this court. "The remedy of mandamus," the Supreme Court has explained, "is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States Dist. Court*, 426 U.S. 394, 401, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976) (internal citations omitted). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L.

Ed. 2d 305 (1967). Emphasizing the rarity of mandamus relief, the Supreme Court has noted that "our cases have answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, *hardly* ever!'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 190-91, 66 L. Ed. 2d 193 (1980) (emphasis in original).

In *Kerr*, the Supreme Court explained the policy underlying the limited nature of mandamus relief:

> [P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.' A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

Kerr, 426 U.S. at 403, 96 S. Ct. at 2124 (internal citations omitted) (ellipses in original).

Consistent with these principles, in determining whether mandamus is warranted, we consider "whether the party seeking the writ has any other adequate means, such as a direct appeal, to attain the desired relief," and "whether that party will be harmed in a way not correctable on appeal." *Nat'l Ass'n of Criminal Def. Lawyers, Inc. v. United States Dep't of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999). Petitioner "has the 'burden of showing that its right to issuance of the writ is clear and indisputable.'" *Gulfstream Aerospace Corp.*

v. Mayacamas Corp., 485 U.S. 271, 289, 108 S. Ct. 1133, 1143-44, 99 L. Ed. 2d 296 (1988).

Our recent decision in *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000), not only demonstrates the strictness of the mandamus standard, but also largely controls the disposition of this case. There, plaintiff alleged, among other things, that President Clinton's personal staff and other White House units that advise and assist the President were maintaining FBI files of former political appointees in violation of the Privacy Act. The district court denied the government's motion to dismiss, ordered discovery, and rejected the White House's assertion of the attorney client, deliberative process, and work product privileges. The government then sought a writ of mandamus to vacate the district court's discovery order with respect to one particular interrogatory. The government also argued that without mandamus relief "the President's interactions with his closest advisors will be irreparably damaged in the future, because the District Court has sought to coerce the White House, on threat of criminal sanction, into following a view of the Privacy Act to which it does not subscribe." *Id.* at 24.

Noting that "[a]lmost the entire thrust of [the government's] petition is that the District Court erred in concluding that the White House is subject to the Privacy Act," we explained that "[e]ven assuming, arguendo, that the District Court's holding on the scope of the Privacy Act is clear error, mandamus relief is not warranted in this case. This is so because, on the record at hand, there has been no showing of harm of the sort required to justify the drastic remedy of mandamus." *Id.* at 23. Further, although acknowledging that " 'disclosure [of highly privileged material] fol-

lowed by appeal after final judgment is obviously not adequate in such cases—the cat is out of the bag,'" *id.* (bracketed material in original), we observed that "[i]n the normal course, . . . mandamus is not available to review a discovery order," *id.* We then denied the request for mandamus, explaining that the government "offered . . . no argument that it is even entitled to the privileges," and that "[a]bsent a viable claim that some important privilege will be infringed if discovery is allowed to proceed, this court has no jurisdiction to review the interlocutory order on this ground." *Id.* at 23-24. As to the government's fear that the district court might hold White House staff in criminal contempt, we explained, "the District Court has no free-wheeling authority to run the affairs of the White House with respect to matters that are not related to the instant case." *Id.* at 24.

With this case law in mind, we consider the petition for writ of mandamus. Petitioners first argue that by allowing broad discovery into "the inner workings of the executive including the Vice President," Emergency Pet. for Writ of Mandamus at 12, on nothing more than a "mere allegation of . . . unofficial non-government" participation in the work of the NEPDG, the district court has "brought to the fore the substantial constitutional questions it sought to avoid," *id.* at 14. Petitioners therefore ask that we direct the district court to decide the case on the basis of the administrative record. For two reasons, we may not do so.

First, as petitioners concede, plaintiffs' cause of action against the Vice President arises not under the APA, but under the Mandamus Act. 28 U.S.C. § 1361. *Cf. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-28 (D.C. Cir. 1996) (explaining availability of "non-

statutory review" even in the absence of a statutory cause of action). Moreover, even if APA review standards apply to mandamus actions—a question we need not resolve here—the rule that APA review is generally limited to the administrative record has two exceptions: "when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (internal citation omitted). Petitioners argue that plaintiffs have not made the "strong showing" required by the first exception. This is true, but plaintiffs do not invoke the first exception. Instead, they rely on the second exception, arguing that the record is inadequate to resolve the statutory issue pending before the district court. As they point out, the President's memorandum establishing the NEPDG and the NEPDG's final report tell us only that the NEPDG's members were all federal employees. The two documents reveal nothing about whether, notwithstanding the President's appointment of only federal officials, non-federal personnel participated in the work of the NEPDG "as if they were members of the NEPDG." Judicial Watch Compl. ¶ 25. Although the Knutson affidavit does address this question, because the government submitted it during litigation, it is not itself part of the administrative record. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419, 91 S. Ct. 814, 825, 28 L. Ed. 2d 136 (1971) (administrative record does not include "litigation affidavits"); *Envtl. Def. Fund, Inc., v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981) (rejecting creation of exception to *Overton Park* to allow parties challenging administrative action to submit affidavits addressing the merits of the agency decision).

As respondents point out, we faced a similar issue in *AAPS*. There, plaintiffs alleged that another presidential committee—President Clinton's Task Force on National Health Care Reform—failed to follow FACA's procedural requirements. We held that in determining the applicability of FACA section 3(2)'s exemption for meetings of full-time government officials, we would look beyond formal membership to whether persons described as consultants "may still be properly described as member[s] of an advisory committee if [their] involvement and role are functionally indistinguishable from those of the other members." *AAPS*, 997 F.2d at 915. To answer that question—essentially the same question the district court faces here—we remanded for "expedited discovery." *Id.* at 916.

Second, and most important given the interlocutory status of this case, even were there some doubt about the district court's refusal to rely on the administrative record—indeed, even if, as petitioners insist, *AAPS* is distinguishable from this case and the district court's ruling amounts to "clear and significant error," Emergency Pet. for Writ of Mandamus at 5—petitioners are entitled to mandamus relief only if they face a risk of harm that cannot be cured in the district court. This is the teaching of the mandamus cases discussed above. Absent harm for which there is "no other adequate means . . . [of] attain[ing] the desired relief," *Nat'l Ass'n of Criminal Def. Lawyers*, 182 F.3d at 986, appellate courts may not grant mandamus relief from a district court's legal judgment even if that judgment constitutes "clear error," *In re Executive Office of the President*, 215 F.3d at 23. "[A]ny error—even a clear one—could be corrected on appeal." *Nat'l Ass'n of Criminal Def. Lawyers*, 182 F.3d at 987. Because this

is equally true of petitioners' second challenge—that the district court erred by failing to dismiss the Vice President as a party—we turn to the key issue on which petitioners' entitlement to mandamus relief depends: Have they identified some "harm" flowing from the district court's challenged rulings that cannot be remedied either in the district court or on appeal following final judgment?

Petitioners' primary claim of harm is that "in the circumstances of this case, . . . extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President raises separation of powers problems of the first order." Emergency Pet. for Writ of Mandamus at 4. Under the circumstances of this case, however, this argument is premature. Far from "order[ing] extensive disclosure of communications between senior executive branch officials and those with information relevant to advice that was being formulated for the President," Reply to Appellees' Resp. to Emergency Pet. for Writ of Mandamus at 1, the district court ordered defendants to produce "non-privileged documents and a privilege log." Order Den. Mots. for Recons. and Protective Order at 1 (D.D.C. Oct. 17, 2002). Petitioners neither produced a privilege log nor, as directed by the district court's earlier order, did they invoke "privileges with particularity." Order Approving Disc. Plan at 2 (D.D.C. Aug. 2, 2002). If mandamus was inappropriate in *Executive Office of the President*, where the President had asserted but failed to justify asserted privileges, it is certainly unjustified here, where petitioners have yet to assert a privilege in the district court. "Absent a viable claim that some impor-

tant privilege will be infringed if discovery is allowed to proceed, this court has no jurisdiction to review the interlocutory order." *In re Executive Office of the President*, 215 F.3d at 24.

Moreover, petitioners' concerns about the potential disclosure of privileged information are fully addressable in the district court or, if necessary, in a later proceeding here. If, in response to the district court's discovery order, petitioners choose to invoke executive or any other privilege, that court, keeping in mind the need to "accord[ ] high respect to the representations made on behalf of the President," *United States v. Nixon*, 418 U.S. 683, 707, 94 S. Ct. 3090, 3107, 41 L. Ed. 2d 1039 (1974), may sustain the privilege, thus giving petitioners all the relief they seek here. *See Kerr*, 426 U.S. at 401, 96 S. Ct. at 2123 (denying mandamus petition challenging district court order rejecting broad state secrets privilege and allowing disclosure of state documents regarding prison-parole system because district court could review documents in camera to determine privilege's applicability). On the other hand, were the district court to reject a claim of executive privilege, thus creating an imminent risk of disclosure of allegedly protected presidential communications, then mandamus might well be appropriate to avoid letting "the cat . . . out of the bag." *In re Executive Office of the President*, 215 F.3d at 23-24; *see In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998) (granting mandamus relief of district court order that diplomats submit to depositions in order to review diplomats' assertion of immunity); *In re: Sealed Case*, 151 F.3d 1059 (D.C. Cir. 1998) (granting mandamus where district court's discovery order was insufficiently protective of secret grand jury information). But so long as

the separation of powers conflict that petitioners anticipate remains hypothetical, we have no authority to exercise the extraordinary remedy of mandamus. As we said in *Executive Office of the President*, "[i]n the normal course, . . . mandamus is not available to review a discovery order." 215 F.3d at 23.

Petitioners next argue that in order to protect the separation of powers, the "President should not be forced to 'consider the privilege question' in response to unnecessarily broad or otherwise improper discovery." Emergency Pet. for Writ of Mandamus at 15 (internal citation omitted). We see two answers to this argument. First, executive privilege is itself designed to protect the separation of powers. "The privilege," the Supreme Court explained in *United States v. Nixon*, "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708, 94 S. Ct. at 3107-08. Were we to hold, as petitioners and the dissent urge, that the Constitution protects the President and Vice President from ever having to invoke executive privilege, we would have transformed executive privilege from a doctrine designed to protect presidential communications into virtual immunity from suit. Yet, as the Supreme Court also held in *Nixon*, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.* at 707, 94 S. Ct. at 3107. Indeed, the Supreme Court has consistently held that because the President is not "above the law," he is subject to judicial process. *Id.* at 715, 94 S. Ct. at 3111; *see also*

Clinton v. Jones, 520 U.S. 681, 703-04, 117 S. Ct. 1636, 1648-49, 137 L. Ed. 2d 945 (1997).

The second answer to petitioners' argument is that their worry about "unnecessarily broad" discovery can be resolved in the district court. According to petitioners, discovery is excessive because (1) they have already produced some 36,000 pages worth of documents and (2) the discovery "compelled by the district court would result in even more sweeping intrusions into the Vice President's office than would result from the remedies available if plaintiffs were to prevail on the merits of their suit." Emergency Pet. for Writ of Mandamus at 4.

The district court has already addressed the first concern. In its order approving plaintiffs' discovery plan, the district court expressly stated: "[S]hould defendants believe that documents or information that they have already released to plaintiffs in different fora are responsive to these discovery requests, defendants shall bear the burden of identifying with detailed precision what information or documents have been so released, and to which discovery requests they believe the information or documents to be responsive." Order Approving Disc. Plan at 2 (Aug. 2, 2002). Petitioners have yet to avail themselves of this aspect of the district court's order.

Petitioners' second concern is well taken. If the district court ultimately determines that the NEPDG is subject to FACA, plaintiffs would be entitled to "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [the] . . . committee." 5 U.S.C.App. 2, § 10(b). Yet plaintiffs' discovery seeks far more than these limited

items. Their third interrogatory, for example, asks for the names of "all Task Force staff, personnel, consultants, employees, and all other persons who participated, in any manner, in the activities of the Task Force or the preparation of the Report." The fourth interrogatory asks that "[f]or each person listed in response to Interrogatory 3, . . . please provide . . . a description of the person's role in the activities of the Task Force and in preparation of the Report." The requests to produce also go well beyond FACA's requirements. For example, the first request seeks "[a]ll documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force." As petitioners point out, if plaintiffs are entitled to "discovery . . . roughly coextensive with the available remedies for a FACA violation, then the textual exemption of advisory groups including only government officials, which presumably was designed to protect against undue interference with executive functions, has little practical effect." Emergency Pet. for Writ of Mandamus at 14.

Plaintiffs' discovery also goes well beyond what they need to prove, as they allege, that FACA applies to the NEPDG, i.e., that non-federal officials participated to the extent that they were effectively NEPDG members. For example, plaintiffs have no need for the names of "all . . . persons" who participated in the Task Force's activities, nor "a description of [each] person's role in the activities of the Task Force." They must discover only whether non-federal officials participated, and if so, to what extent. Nor do plaintiffs require "[a]ll documents identifying or referring to any staff, personnel, contractors, consultants or employees

of the Task Force." Rather, they need only documents referring to the involvement of non-federal officials.

Although petitioners did raise the question of excessive discovery in the district court, they did so in support of their plea for a "protective order relieving [defendants] of *any* obligation to respond to plaintiffs' discovery." Mem. in Supp. of Defs.' Mot. for a Protective Order and for Recons. at 21 (D.D.C. Sept. 3, 2002) (emphasis added). As far as we can tell, petitioners never asked the district court to *narrow* discovery to those matters plaintiffs need to support their allegation that FACA applies to the NEPDG. Moreover, we are confident that the district court, whose pending discovery order invites petitioners to file "objections," will, consistent with the judiciary's responsibility to police the separation of powers in litigation involving the executive, respond to petitioners' concern and narrow discovery to ensure that plaintiffs obtain no more than they need to prove their case.

In thus relying on the district court to protect petitioners from harm, we are following closely in the Supreme Court's footsteps in *Kerr*. There, the Court affirmed the Court of Appeals' denial of a writ of mandamus sought by a state agency challenging a district court's order granting a motion to compel discovery. Even though "the opinion below might be regarded as ambiguous," the Court explained, "we are fortified in our reading of it by a recognition of the serious consequences which could flow from an unwarranted failure to grant petitioners the opportunity to have the documents reviewed by the trial judge in camera before being compelled to turn them over." *Kerr*, 426 U.S. at 405, 96 S. Ct. at 2125. The Supreme Court thus read the Court of Appeals' opinion as "providing petitioners

an avenue far short of mandamus to achieve precisely the relief they seek." *Id.* at 404-05, 96 S. Ct. at 2124-25. "We are thus confident," the Court concluded, "that the Court of Appeals did in fact intend to afford the petitioners the opportunity to apply for and, upon proper application, receive in camera review." *Id.* at 406, 96 S. Ct. at 2125-26. We are equally confident that the district court here will protect petitioners' legitimate interests and keep discovery within appropriate limits—or as the district court itself put it, "tightly reined discovery." Mem. Op. and Order at 32 (D.D.C. Nov. 27, 2002).

In sum, petitioners have not satisfied the heavy burden necessary to obtain a writ of mandamus. Their legal challenges to the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President can be fully addressed, untethered by anything we have said here, on appeal following final judgment. In the meantime, narrow, carefully focused discovery will fully protect the Vice President: Either the Vice President will have no need to claim privilege, or if he does, then the district court's express willingness to entertain privilege claims and to review allegedly privileged documents in camera will prevent any harm. Moreover, such measures will enable the district court to resolve the statutory question—whether FACA applies to the NEPDG—without "sweeping intrusions into the Presidency and Vice Presidency." Emergency Pet. for Writ of Mandamus at 8. And if after limited discovery, it turns out that no non-federal personnel participated as de facto NEPDG members, the district court will never have to face the serious constitutional issue lurking in this case—whether FACA can be constitutionally applied to the President and Vice Presi-

dent. If, on the other hand, the district court not only determines that FACA applies to the NEPDG, but also rejects petitioners' constitutional challenge to the application of the Act, both issues can be fully addressed on appeal following final judgment.

We end with some comments about the dissent. According to the dissent, *AAPS* is wrong, General Services Administration regulations preclude the de facto membership theory, the district court is without jurisdiction, and the case should be remanded with instructions to dismiss. We may not reach these issues for several reasons. To begin with, *AAPS* is circuit law binding on this panel. As we have explained:

> The "decision of a [panel]" is "the decision of the court." Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit. One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court. That power may be exercised only by the full court, either through an *in banc* decision, or pursuant to the more informal practice adopted in *Irons v. Diamond*[, 670 F.2d 265 (D.C. Cir. 1981)].

LaShawn v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (internal citations omitted). *See also Joo v. Japan*, 332 F.3d 679, 687, 2003 WL 21473010 (D.C. Cir. June 27, 2003) (panel of judges is bound by circuit precedent).

Even were we not bound by *AAPS*, we could not consider the dissent's arguments because petitioners raised not one of them—not in the district court, not in their appellate briefs, not even at oral argument. Instead, petitioners argue that *AAPS* is distinguishable,

not wrong; they never mention the GSA regulations; and they argue that the constitutional questions can be avoided by remanding to the district court with instructions to decide the case on the basis of the administrative record. This court has long held that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

Recognizing that appellate courts sit to resolve only legal questions presented and argued by the parties, the dissent maintains that we must nevertheless address these new arguments because they go to the jurisdiction of the district court. Specifically, pointing out that the only viable claim against the Vice President rests on mandamus, the dissent argues that given the constitutional concerns and the GSA regulations, plaintiffs have no "'clear and indisputable' right to relief." Dissent at 2 (citation omitted). The defect in this argument is that it ignores *AAPS*. Because that decision holds that FACA permits a cause of action on the "de facto membership" theory, the district court "clear[ly]" has jurisdiction to entertain plaintiffs' mandamus action. Plaintiffs may or may not prevail, but under the law of this circuit, the district court's jurisdiction is not in doubt. According to the dissent's theory, moreover, all statutory defenses to mandamus actions become jurisdictional, allowing defendants who fail to prevail on motions to dismiss to seek immediate appellate review. Nothing in our case law supports such a result.

The arguments raised by the dissent are also premature. Following limited discovery, the district court may find, as the Knutson affidavit claims, that no non-federal personnel participated in the NEPDG's activities. That would end the case, leaving no need to address the constitutional issues raised by the dissent. If, on the other hand, discovery reveals some degree of participation by non-federal personnel, then the district court will have to decide whether that participation amounts to de facto membership. Only if the participation in fact amounts to such membership will the court have to resolve the constitutional issue—subject, of course, to appellate review following final judgment.

The dissent contends that mandamus relief is nevertheless required because even though petitioners have made no claim of privilege, the mere need to assert privilege will "distract[ ] and divert[ ] [the President] from the performance of his constitutional duties and responsibilities." Dissent at 8. This argument too is foreclosed by circuit precedent. As we held in *Executive Office of the President*, mandamus relief is inappropriate "[a]bsent a viable claim that some important privilege will be infringed if discovery is allowed to proceed." 215 F.3d at 24.

Finally, and contrary to the dissent, we are confident that this opinion fully responds to the constitutional arguments presented in this case. As we have explained, petitioners' primary argument—that the broad discovery plaintiffs seek will violate the separation of powers—is premature. Petitioners have yet to invoke executive privilege, which is itself designed to protect the separation of powers, *see infra* p. 1105, and the narrow discovery we expect the district court to allow may avoid the need for petitioners even to invoke the

privilege. Petitioners also argue that applying FACA to the NEPDG would itself violate the separation of powers. As we have explained, resolution of this issue is also premature, for it assumes the answer to the question the district court has yet to resolve: Is the NEPDG a FACA advisory committee? Not until the district court answers that question and only if it determines that the NEPDG is in fact an advisory committee will that constitutional question be ripe for resolution. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48, 56 S. Ct. 466, 481-484, 80 L.Ed. 688 (Brandeis, J., concurring) (courts should only rule on constitutional issues as a last resort).

III.

The Vice President's appeal of the district court's denial of the motion to dismiss and discovery orders requires little discussion. In general, only final orders are appealable. 28 U.S.C. § 1291. Circuit courts have jurisdiction over interlocutory appeals if the requirements of the collateral order doctrine apply, that is, if the challenged order "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

Largely for the reasons given above, none of the orders the Vice President seeks to appeal satisfies the collateral order doctrine. *See In re Sealed Case*, 151 F.3d at 1063 n.4 (describing similarities between tests for appellate review of interlocutory appeals under mandamus and collateral order doctrine). The Vice

President does not argue otherwise. Instead, he asserts that we have jurisdiction to hear his appeal pursuant to *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). There, the district court had approved subpoenas for audiotapes that President Nixon claimed were protected by executive privilege. Permitting an interlocutory appeal of this otherwise non-appealable order, the Supreme Court explained that it would be "unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government," to require President Nixon to follow the traditional path for perfecting his appeal, namely, "'resist[ing] . . . [the court's] order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.'" *Id.* at 691, 692, 94 S. Ct. at 3099-3100 (quoting *United States v. Ryan*, 402 U.S. 530, 533, 91 S. Ct. 1580, 1582, 29 L. Ed. 2d 85 (1971)).

This case is very different. Because the Vice President has yet to invoke executive privilege, we are not confronted with the "unseemly" prospect of forcing him to choose between either (1) disclosing allegedly privileged information and appealing following final judgment after the "cat is out of the bag," or (2) refusing to disclose and going into criminal contempt in order to create an appealable order. Absent this constitutionally troubling choice, *Nixon* is inapplicable.

At oral argument, the government contended that applying *Nixon* to this case would amount to a "modest extension." Tr. of Oral Arg. at 5:10. We disagree. Including the Vice President's appeal within *Nixon*'s ambit would convert a narrow exception designed to protect fundamental privileges into a blanket exception to the collateral order rule in suits against the executive. This court has no authority to "extend" the law beyond its well-prescribed bounds.

IV.

The petition for mandamus is dismissed and the motion to dismiss the appeal is granted.

So ordered.

HARRY T. EDWARDS, Circuit Judge, concurring:

I concur in the majority opinion, because, in my view, it faithfully adheres to the law of the circuit and correctly decides the matter at hand. I also agree with the dissenting opinion insofar as it acknowledges that *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"), is the law of the circuit and that the Government's position cannot withstand scrutiny under *AAPS* We are bound to follow the law of the circuit. Therefore, the Government's petition must be denied.

The Government comes to this court seeking mandamus or collateral order review on an interlocutory appeal, to block discovery, *having never claimed that any of the disputed material is privileged and having never responded to the District Court's invitation to specify their objections to the disputed discovery orders.* The Government merely claims that interlocutory review is appropriate because this case implicates "separation of powers" issues. This is an extraordinary proposition. There is no legal authority of which I am aware—and the Government cites none—to support jurisdiction in this court.

I suspect that, on remand, the Government may be able effectively to challenge the breadth of the disputed discovery order. I also suspect that, once these objec-

tions have been raised, the District Court will tailor the discovery order. Until the Government voices its objections, however, this court has no jurisdiction to meddle in a dispute over a discovery issue that should properly be resolved by the District Court in the first instance.

Under 28 U.S.C. § 1291, discovery orders are appealable only after entry of final judgment in the underlying case, or under the "collateral order" doctrine upon entry of an order holding the litigant in criminal contempt. *See Byrd v. Reno*, 180 F.3d 298, 302 (D.C. Cir. 1999); *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1996). There clearly has been no final judgment in the underlying case here, and no criminal contempt order. The Government's only authority for asserting that the discovery order is appealable under § 1291 despite the absence of a final order is *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). But, as the majority notes, *Nixon* is inapposite, because that case involved a situation in which discovery was ordered in the face of the President's assertion of *executive privilege*. The Government has asserted no privilege in this case. There is no other basis for an invocation of the collateral order doctrine in this case and the Government does not suggest otherwise.

Rather, this case focuses principally on the Government's request for mandamus relief. Mandamus "is reserved for *extraordinary circumstances* in which the petitioner demonstrates that his right to issuance of the writ is clear and indisputable and that no other adequate means to obtain relief exist." *Byrd*, 180 F.3d at 302. "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Kerr v. U.S. Dist. Court*

for the N. Dist. of Cal., 426 U.S. 394, 402, 96 S. Ct. 2119, 2123-24, 48 L. Ed. 2d 725 (1976) (citation and internal quotation marks omitted). Applying this well-understood test, the Government can point to no basis for mandamus at this juncture, because it can point to no harm. And it can point to no harm because it has yet to specify any privileged materials or otherwise cite objections for consideration by the District Court. It is not enough for the Government to come to this court and claim that discovery *may* expose materials that are protected by privilege or the deliberative process. It must first specify its objections so that they may be addressed by the District Court.

The Government suggests that interlocutory review is appropriate here, because the District Court is bound to consider only the "administrative record," *sans* discovery, with respect to any of plaintiffs' claims resting on the Administrative Procedure Act ("APA"). This argument is premised on an erroneous view of the law. In the Supreme Court's seminal decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 825-26, 28 L. Ed. 2d 136 (1971), the Court made it clear that there are circumstances in which discovery or testimony by agency officials may be necessary and appropriate to resolve an APA claim arising in District Court. In that case, the Supreme Court stated that judicial review was "to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence," the District Court could "require the administrative officials who participated in the decision to give testimony explaining their action." *Id.* And in *AAPS*, we

found it entirely appropriate to remand for expedited discovery to determine whether a working group was an advisory committee under the Federal Advisory Committee Act ("FACA"). *See AAPS*, 997 F.2d at 915-16. In short, tailored discovery may be necessary to determine the question whether a disputed committee is subject to FACA's strictures.

The decision in *AAPS* is perfectly consistent with both *Overton Park* and the law of this circuit. In *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1 (D.C. Cir. 1998), this court plainly stated that judicial review properly may involve more than just the administrative record in an APA case "when there has been a 'strong showing of bad faith or improper behavior' *or* when the record is so bare that it prevents effective judicial review." *Id.* at 7 (emphasis added) (citing *Overton Park*, 401 U.S. at 420, 91 S. Ct. at 825-26; *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997-98 (D.C. Cir. 1990)). The dissent cites a Second Circuit case, *National Nutritional Foods Association v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974), for the proposition that discovery into the internal workings of Government is not allowed without "strong preliminary showings of bad faith." But this is an incomplete characterization of *National Nutritional Foods*, which fully recognized that *Overton Park* did not necessarily and always require a showing of bad faith. *See id.*; *see also Overton Park*, 401 U.S. at 420, 91 S. Ct. at 825-26 ("[W]here there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.").

Overton Park and *Commercial Drapery* make it clear that the exception to the rule of no discovery in APA cases is wider than bad faith. Thus, the absence of any showing of bad faith in this case is immaterial, because plaintiffs here seek discovery on the ground that the administrative record is inadequate for judicial review. And there is no serious doubt here—just as there was none in *AAPS*—that the bare administrative record does not allow for meaningful judicial review of plaintiffs' claim. Therefore, reasonable and carefully tailored discovery is legally permissible and entirely appropriate in this case. *See AAPS*, 997 F.2d at 915-16.

As the opinion for the majority correctly notes, this case is controlled by our decision in *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000). The Government cannot find a way around that precedent. Thus, there is absolutely no basis for our interlocutory review of the District Court's discovery orders, either under the collateral order doctrine or on a petition for mandamus, where the Government has asserted no privilege and has failed to specify any objections to the discovery orders. If, on remand, the District Court fails to tailor discovery pursuant to valid objections or assertions of privilege by the Government, then there may be a basis for appellate review. We are far from that point at this juncture of this litigation, however. Therefore, this appeal should be dismissed, because we have no jurisdiction to consider it.

I respectfully disagree with the dissent's argument that we should instead dismiss *plaintiffs'* case because the District Court lacks mandamus jurisdiction over

plaintiffs' claim. As the dissent correctly acknowledges, *AAPS* is the law of this circuit, and we are bound by it, as is the District Court. Under *AAPS*, plaintiffs clearly had a basis for seeking relief in the District Court ordering the Government to comply with FACA. The dissenting opinion cites a General Services Administration ("GSA") regulation, 41 C.F.R. 101-6.1003 (2000), to suggest that the "*de facto* member doctrine" of *AAPS* is misguided. This argument might be tenable if the court in *AAPS* was obliged to give deference to GSA's interpretation of FACA. But the Supreme Court in *Public Citizen v. U.S. DOJ*, 491 U.S. 440, 465 n.12, 109 S. Ct. 2558, 2572 n.12, 105 L. Ed. 2d 377 (1989), made it clear that any "assertion that GSA's interpretation of FACA's provisions is 'binding' confuses wish with reality." In any event, the cited GSA regulation surely does not take precedence over the law of this circuit on the matter here at issue. Under *AAPS*' "*de facto* member doctrine"—which is indisputably the law of the circuit—plaintiffs have a legal basis for seeking mandamus relief and the District Court in turn has mandamus jurisdiction over the claim.

Finally, most of the arguments raised in the dissenting opinion have never been presented to the District Court and they were not raised for consideration in the Government's brief to this court or in the oral argument before this court. In other words, the dissent's position rests on a view of FACA that has never been urged by the Government. "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where 'injustice might otherwise result.' Suffice it to say that this is not such a case." *Singleton v. Wulff*, 428

U.S. 106, 121, 96 S. Ct. 2868, 2877-78, 49 L. Ed. 2d 826 (1976) (citations omitted). The reason that a federal appellate court normally does not consider an issue not passed upon below is because parties, such as plaintiffs in this case, "should have the opportunity to present whatever legal arguments [they] may have in defense of the statute." *Id.* at 120., 96 S. Ct. at 2877-78. The dissent's theory of this case has not been propounded by the Government; it runs counter to the law of the circuit; and it relies on GSA regulations that the Supreme Court has said do not carry the force of law. In these circumstances, I can see no reasonable basis for this court to act *sua sponte* on a theory that has been neither raised by the parties nor addressed by the District Court.

For the foregoing reasons, I concur in the opinion for the majority.

RANDOLPH, Circuit Judge, dissenting:

My disagreement with the majority is about not only its logic but also its starting points, one of the most prominent of which is derived from *Ass'n of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*). There is a serious constitutional problem in *AAPS*'s interpretation of the Federal Advisory Committee Act (FACA), 5 U.S.C.App. § 1 *et seq.*—a problem this case exposes. As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality. *See* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994). The decision in this case pushes it over.

The case comes to us in a peculiar posture. We have mandamus on top of mandamus Both sides have invoked the All Writs Act, 28 U.S.C. § 1361. The federal officers have petitioned this court for a writ of mandamus barring discovery. In the district court, plaintiffs sought a writ of mandamus ordering the federal officers to comply with FACA.[1] Mandamus, the majority tells us, is "drastic"; it is available only in "extraordinary situations"; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a "clear and indisputable" right to relief. These words are directed at the federal officers' petition in this court, but they apply equally to plaintiffs' suits in the district court. *See Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). In my view, the federal officers have a clear right to relief in the court of appeals because the plaintiffs do not have a clear right to relief in the district court. I would therefore grant the writ and order

---

[1] Mandamus was the only basis upon which the actions could have proceeded in the district court. All agree that FACA does not itself create a cause of action. It is also clear that the Administrative Procedure Act, which plaintiffs invoked, does not apply. The alleged FACA "advisory committee" here was not an "agency" within the meaning of the APA. *See Meyer v. Bush*, 981 F.2d 1288, 1297-98 (D.C. Cir. 1993). It was part of the Executive Office of the President. The President is not subject to the APA, and neither are units within the Executive Office whose sole function is to advise the President. *See Franklin v. Massachusetts*, 505 U.S. 788, 801, 112 S. Ct. 2767, 2775-76, 120 L. Ed. 2d 636 (1992); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 971-72, 63 L. Ed. 2d 267 (1980).

Why the majority analyzes (maj. op. at 1103) the adequacy of the administrative record in terms of the APA is therefore a mystery. Stranger still is the majority's insistence that there even must be an administrative record. *See supra* pp. 1102-1103.

the district court not only to bar discovery but to dismiss the actions.

"The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . ." U.S. Const. art. II, § 2, cl. 1.

In January 2001 President Bush sought advice on energy policy. To that end, he established, in the Executive Office of the President, the National Energy Policy Development Group. The President named to this task force the Vice President; the Secretaries of Treasury, Interior, Agriculture, Commerce, Transportation, and Energy; the Director of the Federal Emergency Management Agency; the Administrator of the Environment Protection Agency; and three Assistants to the President. The President authorized the Vice President to invite "as appropriate, other officers of the Federal Government." The Group's mission was to "develop a national energy policy designed to help the private sector" and State and local governments, "to gather information, deliberate, and . . . make recommendations to the President." In May 2001 the Group issued its recommendations to the President. The Group's final report listed, as its members, the officials the President appointed in his January directive plus the Secretary of State and the Director of the Office of Management and Budget. *See* National Energy Policy Development Group, National Energy Policy: Report of the National Energy Policy Development Group (2001), *available at* http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.

If the President's Energy Policy Group were an "an advisory committee" within the meaning of FACA, the

President was required to make its membership "fairly balanced." 5 U.S.C.App. § 5(b)(2). If FACA applied, the Group should have filed a detailed "charter" with the General Services Administration (GSA) before the Group began operating. *Id.* § 9(c). It should have held its meetings open to the public and allowed interested persons to file comments. *Id.* § 10(a)(1). It should have given notice of its meetings in the Federal Register. *Id.* § 10(a)(2). It should have kept detailed minutes of each meeting and "a complete and accurate description of matters discussed and conclusions reached." *Id.* § 10(c). And it should have made available to the public its "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda" and other documents. *Id.* § 10(b).

There is no doubt that these requirements would violate the separation of powers if they were imposed on all groups formed by the President for the purpose of providing him advice. *See* Bybee, *supra*. And so FACA contains an exemption for committees "established or utilized" by the President when the committees are "composed wholly of full-time . . . officers or employees of the Federal Government." 5 U.S.C.App. § 3(2). On the face of it, the Energy Policy Group, consisting only of high-level federal officials, was thus exempt from FACA.

But plaintiffs, relying on *AAPS*, alleged that the Group nevertheless was a FACA advisory committee. *AAPS* held that an outside consultant may "be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members," thus rendering the entire committee subject to FACA. 997 F.2d at 915. It is far from clear where the *AAPS* court derived its

holding. No section of FACA was cited. The opinion purports to be interpreting the word "member," but the operative provision—quoted in the preceding paragraph—does not use that word. The *AAPS* court knew that an inquiry into functional equivalency would be fact-bound, and so it authorized discovery. *Id.* at 915-16.

It is this holding in *AAPS* that enabled plaintiffs—through allegations that private citizens were *de facto* members of the Energy Policy Group—to avoid a motion to dismiss, and it is this holding that led directly to the discovery order we have before us. Judicial Watch's complaint names four private individuals and alleges that they "regularly attended and fully participated in non-public meeting of the [Energy Policy Group] as if they were members." Judicial Watch Compl. at 8-9. The Sierra Club's complaint is more general: it alleges that "[e]nergy industry executives, including multiple representatives of single energy companies, and other non-federal employees, attended meetings and participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups." Sierra Club Compl. at 6. The allegations are on information and belief.

Given *AAPS*'s formulation, extensive discovery into the Executive Office of the President is inevitable. Functional equivalency, as *AAPS* contemplated, invites a comparative judgment. One cannot know whether a private individual acted like a member of a Presidential committee unless one knows how the members acted. And so plaintiffs proposed, and the district court approved, free range discovery: interrogatories asking for descriptions of all the activities of all individuals—members and staff alike—who were involved in the

work of the Energy Policy Group, and requests for documents detailing all communications between those working for the Group and their governmental departments with persons who were not full-time federal employees. The approved discovery plan also contemplates depositions.

My colleagues are confident that the district court can rein in the discovery, but I cannot see how this can be done in any non-arbitrary way. The *AAPS* opinion provides no standards. And my colleagues never articulate their conception of *de facto* membership. Left open is an extensive area to be explored in depositions, interrogatories, and document production. Consider just a few of the possibilities. Suppose it turns out that a private individual attended 6 of the Group's 12 meetings. Would that make him a *de facto* member? Would it matter if discovery revealed that some of the members the President appointed attended the same number of, or even fewer, meetings? What if the private individual attended all meetings but did not speak, or was present only for a short period each time? Would it matter whether the private individual had a place at the table or sat on the side with the Group's staff? Or whether the private individual attended only a few meetings, but was quite influential in the formulation of the final recommendations? Should there be discovery into what impact the person's presence or statements had on the other members, and how would that discovery proceed? Suppose the private individual submitted memoranda or other documents. Is there to be discovery for the purpose of determining whether the other members of the Group took those documents into account in performing their information gathering function or in formulating their view of energy policy?

(One of the complaints alleges that a corporate CEO handed the Vice President a three-page memorandum on the subject of energy.) Would it be of any consequence that the private person met individually with some of the members the President appointed? (There are also allegations to this effect.) And if so, is there to be discovery of who said what, and how this affected the work of the Group?

These problems and others are a direct result of *AAPS* and its lack of any principled standard for determining who is and who is not a *de facto* member of a Presidential committee. For the judiciary to permit this sort of discovery, authorized in the name of enforcing FACA—a statute providing no right of action, *see supra* note 1—strikes me as a violation of the separation of powers. The intrusion into the inner workings of the Presidency, the disruption this intrusion is bound to entail, the probing of the mental processes of high-level Cabinet officers inherent in the type of discovery that *AAPS* sanctions, the deleterious impact on the advice the President needs to perform his constitutional duties —all this and more present "formidable constitutional difficulties," as the Supreme Court acknowledged in *Public Citizen v. Department of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558, 2572-73, 105 L. Ed. 2d 377 (1989); *see also id.* at 488, 109 S. Ct. at 2584 (Kennedy, J., joined by the Chief Justice and O'Connor, J., concurring in the judgment). In fact, I believe the "constitutional difficulties" here are even more "formidable" than they were in *Public Citizen*. Even outside the Executive Office of the President, courts do not allow this sort of discovery into the internal workings of government departments without "strong preliminary showings of bad faith." *Nat'l Nutritional Foods Ass'n v. FDA*, 4[illegible]

F.2d 1141, 1145 (2d Cir. 1974) (Friendly, J.). As we held in *Checkosky v. SEC*, 23 F.3d 452, 454, 489 (D.C. Cir. 1994) (opinion of Randolph, J.), unless there has been such a showing—here there was none—"agency deliberations, like judicial deliberations, are for similar reasons privileged from discovery," as are intra-agency memoranda and other documents recording how and why decisions or recommendations have been reached. "Requiring an agency to produce such internal materials and allowing litigants to depose agency officials ... would be warranted only in the rarest of cases." *Id.*[2]

The majority and concurring opinions, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419, 91 S. Ct. 814, 825-26, 28 L. Ed. 2d 136 (1971), insist that discovery is permissible here because the "administrative record" is inadequate. Those who forget the reason for a rule are apt to misapply it. I can think of no better illustration than what has occurred here. My colleagues have entirely ignored *why* the Supreme Court said it might be necessary to take testimony: the administrative record in *Overton Park* was not before the Court, and the administrative officials had not explained their action. This created a gap, a gap that needed filling because § 706 of the Administrative Procedure Act, 5 U.S.C. § 706, required the reviewing

[2] None of the material sought in discovery here would be available through the Freedom of Information Act (FOIA). The Supreme Court held in *Kissinger v. Reporters Committee for Freedom of the Press* that FOIA does not cover "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." 445 U.S. 136, 156, 100 S. Ct. 960, 971-72, 63 L. Ed. 2d 267 (1980) (internal quotation marks omitted).

court to consider "the whole record" in determining whether the agency action was supported by substantial evidence. 401 U.S. at 419-20, 91 S. Ct. at 825-26.[3] But in this case there is no gap in an administrative record. The Energy Policy Group was not an administrative agency; it was not required to make findings of fact and conclusions of law in order to enable judicial review under the APA; and the officials the President named to the group were not agency officials within the meaning of the APA. *See supra* note 1. Neither the district court nor this court would conduct judicial review under § 706 of the APA, yet that was the source of the *Overton Park* holding on which the majority relies.[4] *See supra* note 1. To state what remains of the majority's rationale is to refute it: because Presidential committees are not APA agencies there is no administrative record; therefore there must be discovery to compile an administrative record adequate for judicial review under the APA even though the APA does not apply and even though there will be no such judicial review.

[3] "Even on those rare occasions when [discovery pursuant to *Overton Park*] is appropriate, the district court is not engaged in ordinary fact-finding, but instead is filling in gaps in the record to determine what the agency actually did." *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1227 (D.C. Cir. 1993).

[4] Even in APA cases, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"—which is precisely what the majority has allowed the district court to do. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 1607, 84 L. Ed. 2d 643 (1985).

The majority also maintains that there is no "harm" to the Presidency, that if discovery probes too extensively, all the federal officials need do is assert executive privilege or any other privilege that might be available. Maj. op. at 1103-1105. The unstated premise of the majority's view is that the only potential harm would be in the revelation of privileged material and that the federal officers are fully capable of making sure this does not occur. If this were an adequate answer, department heads and agency officials would regularly be subject to discovery; they too could protect themselves by asserting privileges.

The majority's no-harm proposition is especially ill founded in this case. The Energy Policy Group was part of the Executive Office of the President. If executive privilege is to be asserted, it therefore appears that the President must make the decision. "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S. Ct. 528, 531-32, 97 L.Ed. 727 (1953) (footnotes omitted); *see In re Sealed Case*, 121 F.3d 729, 744 n.16 (D.C. Cir. 1997). Already the government has voluntarily produced some 36,000 pages of documents in this matter. How many additional documents are potentially subject to discovery we do not know. But it is obvious that decisions to assert privileges must be made document by document and often line by line. With respect to interrogatories and depositions, the decisions about privilege must be made question by question. Each such assertion will trigger yet another round of proceedings in the district court, unless the plaintiffs acquiesce in the President's judgment. In all of this the President will be distracted

and diverted from the performance of his constitutional duties and responsibilities. The Supreme Court recognized as much in *Nixon v. Fitzgerald*, 457 U.S. 731, 751, 102 S. Ct. 2690, 2702, 73 L. Ed. 2d 349 (1982): "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *See also Clinton v. Jones*, 520 U.S. 681, 694 n.19, 117 S. Ct. 1636, 1644 n.19, 137 L. Ed. 2d 945 (1997) (reiterating that the President generally should not be burdened with suits challenging his official conduct).

If Congress, in order to ensure that outsiders did not have "undue influence," had passed a law requiring all groups within the Executive Office of the President to disclose publicly not only their advice to the President but also all their records, I am confident the law would be struck down as a violation of the separation of powers. My confidence in the unconstitutionality of such a law is not lessened by the prospect that the President might resist some disclosure by invoking executive privilege. *See Public Citizen*, 491 U.S. at 488-89, 109 S. Ct. at 2584 (Kennedy, J., concurring in the judgment). Discovery on the basis of allegations of *de facto* membership cannot be distinguished from such a law. Any Presidential committee that consults anyone outside of government, or is suspected to have done so, is potentially subject to discovery into its inner workings. All a plaintiff has to do is bring a mandamus action and allege that private individuals had some ill-defined role in a committee of federal officers advising the President. And according to the majority opinion, the court of appeals is powerless to prevent this.

Although more could be said, I will not dwell further on the constitutional problems raised by today's decision. I believe those problems may be avoided on the basis of a regulation apparently not brought to the court's attention in *AAPS*—a regulation that is contrary to the *de facto* member doctrine. Once that doctrine is cast aside, as it surely must be, *see McCreary v. Offner*, 172 F.3d 76, 81 (D.C. Cir. 1999), it becomes apparent that the district court did not have jurisdiction and that the complaints must be dismissed.[5]

At the time the President formed the Energy Policy Group and during the time plaintiffs allege non-federal personnel attended its meetings, a GSA regulation defined "committee member" to mean "an individual who serves by appointment on a committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." 41 C.F.R. § 101-6.1003 (2000).[6] As in *AAPS*, the defendants in this case did not mention the

[5] Contrary to the implication of the majority, the federal officers have repeatedly argued before the district court and this court that the discovery, as permitted by *AAPS*, violates the separation of powers. *See, e.g.*, Emergency Pet. For Writ of Mandamus at 14-15; *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 46 (D.D.C. 2002). The problem here is not that the defendants failed to make the arguments. The problem is that the majority failed to answer them.

[6] On August 20, 2001, the General Services Administration redefined "committee member" to mean "an individual who serves by appointment or invitation on an advisory committee or subcommittee." *Federal Advisory Committee Management*, 66 Fed. Reg. 37,728, at 37,734 (July 19, 2001) (codified at 41 C.F.R. § 102-3.25). FACA does not authorize retroactive rulemaking, and there is no indication that this regulation was meant to be retroactive. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471-72, 102 L. Ed. 2d 493 (1988).

regulation in their briefs or at oral argument. Nevertheless we must deal with it, for two reasons.

First, the regulation affects the mandamus jurisdiction of the district court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S. Ct. 1003, 1012-13, 140 L. Ed. 2d 210 (1998). Plaintiffs have not alleged that any of the private individuals they have in mind ever "serve[d] by appointment" to the Energy Policy Group. They have not alleged, in terms of the regulation, that any of these individuals had an "obligation" to serve on the Group or that any of them had the right to vote on matters coming before it.[7] As I wrote in the beginning of this opinion, in mandamus it must appear on the face of the pleadings that the plaintiffs have a "clear" right to relief. *See Power v. Barnhart*, 292 F.3d at 784; *see also Ahmed v. Dep't of Homeland Sec.*, 328 F.3d 383, 386-87 (7th Cir. 2003). In the absence of any allegations satisfying the regulatory definition of "member," plaintiffs had no clear right to relief and the district court therefore did not have jurisdiction.

The other reason is that relying on the regulation rather than the *de facto* member doctrine of *AAPS* avoids the constitutional difficulties this sort of FACA litigation poses, much in the same way the Supreme Court avoided those difficulties in *Public Citizen*, 491

[7] If the regulation controls and if plaintiffs had made these allegations, it would have been a simple matter to determine whether evidence supported the claims. Wide ranging discovery of the sort approved here would be unnecessary and improper. For instance, only the President, and through his directive, the Vice President, had the authority to appoint members to the Group, and even then the authority was limited to full-time government employees.

U.S. at 466-67, 109 S. Ct. at 2572-73. *See Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987).[8]

The validity of GSA's definition of "member" cannot be doubted. GSA is "the agency responsible for ministering FACA." *Public Citizen*, 491 U.S. at 463 n.12, 109 S. Ct. at 2572 n.12. It is charged, in § 7(c) with the duty "to prescribe administrative guidelines," which § 8(a) refers to as "directives." And under § 4(a), regulations GSA promulgates under FACA "shall apply to each advisory committee." I recognize that the Court in *Public Citizen* gave "diminished deference" to another GSA regulation implementing FACA, without mentioning *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984).[9] But even if GSA's regulation is not entitled to *Chevron* deference, and should

[8] The majority contends that the court is bound by *AAPS* to permit discovery to determine *de facto* membership. Maj op. at 1107-1108; *see also* concurring op. at 1111-1112. However, *AAPS* did not consider the GSA regulation, nor did it address the constitutional issues presented by authorizing discovery. Accordingly, *AAPS*'s holding does not preclude the court from considering these points. *See Hagans v. Lavine*, 415 U.S. 528, 533 n.5, 94 S. Ct. 1372, 1377 n.5, 39 L. Ed. 2d 577 (1974); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38, 73 S.Ct. 67, 69-70, 97 L.Ed. 54 (1952); *see also Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557, 121 S. Ct. 1043, 1057, 149 L. Ed. 2d 63 (2001) (Scalia, J., dissenting).

[9] 491 U.S. at 463 n.12, 109 S. Ct. at 2572 n.12. The Court gave several reasons, among which were that the regulation was not a "contemporaneous construction" of FACA because it was not promulgated until years after the statute came into effect, and that GSA's regulations did "carry the force of law." *Id.* *See generally* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

receive only whatever deference is due under *Skidmore*,[10] I would apply the regulation to this case in light of the problems of adhering to the *de facto* member doctrine of *AAPS*. *Cf. University of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002). The regulation has the added advantage of enabling the President, at the time of formation of his committee, to determine whether the committee must comply with the many requirements FACA imposes. The *de facto* membership doctrine, in contrast, will almost invariably require an after-the-fact determination, contemplating as it does an examination of what role a private individual played throughout the committee's life.

In short, I would issue the writ of mandamus and send the case back to the district court with instructions to dismiss the complaints.

[10] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L.Ed. 124 (1944).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action 01-1530 (EGS)
JUDICIAL WATCH, INC., PLAINTIFF
v.
NATIONAL ENERGY POLICY
DEVELOPMENT GROUP, DEFENDANT

Civ. Action 02-631 (EGS)
SIERRA CLUB, PLAINTIFF
v.
VICE PRESIDENT RICHARD CHENEY, ET AL.
DEFENDANTS

Filed: Oct. 17, 2002

ORDER

Pursuant to the motion hearing held in this matter on October 17, 2002, and for the reason given in open Court and outlined in this Court's July 11, 2002 Memorandum Opinion, it is by the Court hereby

ORDERED that defendants' motion for reconsideration of the Court's August 2, 2002 order is hereby **DENIED**; and it is

FURTHER ORDERED that defendants' motion for a protective order is hereby **DENIED**; and it is

FURTHER ORDERED that the defendants who have not already done so shall produce non-privileged documents and a privilege log in compliance with this Court's August 2, 2002 Order by no later than November 5, 2002; and it is

FURTHER ORDERED that the defendants shall file any motion requesting a stay of proceedings pending appeal by no later than **October 21, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that plaintiffs shall respond in writing to the defendants' motion to stay by nc later than **October 24, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that defendants shall submit a reply to plaintiffs' response by no later than **October 25, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that a hearing will be held on defendants' motion requesting a stay pending appeal on **October 31, 2002** at 1:00 p.m. in **Courtroom One.**

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
October 17, 2002

Notice to:

Larry Klayman, Esq.
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, D.C. 20024
Counsel for plaintiff Judicial Watch

Patrick Gallagher, Esq.
Alex Levinson, Esq.
Sierra Club
85 Second Street
San Francisco, CA 94104
Counsel for plaintiff Sierra Club

Daniel Edward Bensing, Esq.
David O. Bucholz, Esq.
Anne L. Weismann, Esq.
Thomas Millet, Esq.
Jennifer Paisner, Esq.
U.S. Department of Justice
Civil Division, Federal Program Branch
P.O. Box 883
Washington, DC 20044
Counsel for federal defendants

Howard M. Crystal, Esq.
MEYER & GLITZENSTEIN
1601 Connection Avenue, NW
Suite 700
Washington, D.C. 20009
Counsel for amicus NRDC

Robert S. Litt, Esq.
ARNOLD & PORTER
555 12th St W
Washington, D.C. 20004-1206
Counsel for defendant Thomas Kuhn

Paul Christian Rauser, Esq.
WILLIAMS & CONNOLLY
725 12th STREET, NW
Washington, D.C. 20005
Counsel for defendant Haley Barbour

Richard D. Horn, Esq.
BRACEWELL & PATTERSON LLP
2000 K St NW
Suite 500
Washington, DC 20006-1872
Counsel for defendant Mark Racicot

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nos. Civ. Action 01-1530 (EGS),
Civ. Action 02-631 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY
DEVELOPMENT GROUP, DEFENDANT

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.
DEFENDANTS

Filed: Aug. 2, 2003

ORDER

On July 11, 2002 this Court granted in part and denied in part federal defendants' motion to dismiss these consolidated cases brought by plaintiffs Judicial Watch and the Sierra Club. This court then ordered defendants to file any objections to that plan. Having considered the proposed plan and defendants' objections thereto, for the reasons given in open court today, it is hereby

ORDERED that plaintiffs' discovery plan is **APPROVED**; it is

FURTHER ORDERED that in light of plaintiffs' representations to the Court that the first set of interrogatories and first request for the production of documents will be served upon defendants today, defendants shall respond to these requests by no later than **September 3, 2002**. Defendants shall fully comply with these requests, or file detailed and precise object to any of these requests, defendants shall not make general invocations of privilege with respect to cateories of documents or questions, but must identify and explain their invocations of privilege with particularity; it is

FURTHER ORDERED that should defendants believe that documents or information that they have already released to plaintiffs in different fora are responsive to these discovery requests, defendants shall bear the burden of identifying with detailed precision what information or documents have been so released, and to which discovery requests they believe the information or documents to be responsive; it is

FURTHER ORDERED that in addition to filing any specific objections to discovery requests with this Court by September 3, 2002, defendants shall also file with the Court by that date their responses to plaintiffs' interrogatories and a summary of the documents that were produced; it is

FURTHER ORDERED that a status hearing shall be held on **September 13, 2002** at **10:00 a.m.** in **Courtroom One** to discuss defendants' discovery responses and the need for further briefing of constitutional issues raised by any invocations of privilege, if necessary.

IT IS SO ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
October 17, 2002

Notice to:

Larry Klayman, Esq.
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, D.C. 20024
Counsel for plaintiff Judicial Watch

Patrick Gallagher, Esq.
Alex Levinson, Esq.
Sierra Club
85 Second Street
San Francisco, CA 94104
Counsel for plaintiff Sierra Club

Anne L. Weismann, Esq.
Thomas Millet, Esq.
Jennifer Paisner, Esq.
U.S. Department of Justice
Civil Division, Federal Program Branch
P.O. Box 883
Washington, DC 20044
Counsel for federal defendants

Howard M. Crystal, Esq.
MEYER & GLITZENSTEIN
1601 Connection Avenue, NW
Suite 700
Washington, D.C. 20009
Counsel for amicus NRDC

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Nos. Civ.A. 01-1530(EGS),
Civ.A. 02-631(EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANT

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL., DEFENDANTS

July 11, 2002

MEMORANDUM OPINION

SULLIVAN, District Judge.

Plaintiffs Judicial Watch, Inc. and Sierra Club filed these now-consolidated lawsuits against Vice President Richard Cheney, the National Energy Policy Development Group ("NEPDG"), various other federal officials,[1] and private individuals[2] to enforce the require-

---

[1] The federal officials named in Judicial Watch's Second Amended Complaint include: Secretary of the Treasury Paul

ments of the Federal Advisory Committee Act ("FACA"), 5 U.S.C.App. 2, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*, and the federal mandamus statute, 28 U.S.C. 1361. While the claims raised by each plaintiff differ in relevant and important ways, there is substantial overlap between the two complaints. Both plaintiffs seek information concerning the activities of the NEPDG and its members in developing and recommending to President George W. Bush a national energy policy. Both plaintiffs allege that private individuals were given a significant role in developing this energy policy, and as a result, the confidentiality under which the NEPDG operated violated the requirements of FACA. Defendants have moved to dismiss both complaints, raising a

---

O'Neill, Secretary of the Interior Gail Norton, Secretary of Agriculture Ann Veneman, Secretary of Commerce Donald Evans, Secretary of Transportation Norman Mineta, Secretary of Energy Spencer Abraham, Secretary of State Colin Powell, Director of Federal Emergency Management Joseph Allbaugh, Administrator of the Environmental Protection Agency Christine Todd Whitman, Chairman of the Federal Energy Regulatory Commission Patrick Wood, Director of the Office of Management and Budget Mitchell Daniels, Assistant to the President Joshua Bolton, and Assistant to the President Larry Lindsey. The federal officials named in Sierra Club's Complaint include: Andrew Lundquist, Executive Director of the NEPDG, Director of Energy Policy for Vice President Cheney and Senior Policy Advisor to the Department of Energy, Secretary Abraham, Secretary Evans, Secretary Norton, Secretary Veneman, Secretary O'Neill, Secretary Mineta, and Administrator Whitman.

[2] The private individuals named in Judicial Watch's Second Amended Complaint include: Mark Racicot, Haley Barbour, Kenneth Lay, Thomas Kuhn, and John and Jane Does 1-99, Certain Unknown Non-Federal Employees. Sierra Club sued no non-federal individual defendants.

number of jurisdictional, statutory, and constitutional objections to these suits.

This case comes before the Court on federal defendants' motions to dismiss the Judicial Watch and Sierra Club complaints, as well as three private defendants' motions to dismiss the Judicial Watch complaint. Upon consideration of these motions, the responses and replies thereto, the oral argument of counsel, the applicable statutory and case law, the Court grants in part and denies in part the federal defendants' motions, and grants the private defendants' motions.

BACKGROUND

I. The National Energy Policy Development Group

On January 29, 2001, President George W. Bush issued a Memorandum establishing the National Energy Policy Development Group. *See* Sierra Club Compl. at ¶ 16; Defs.' Mem. of Points & Authorities in Support of Defs.' Mot. to Dismiss filed on 3/8/2002, Attach. A ("Bush Mem."). The Presidential Memorandum mandated that the NEPDG was to be established within the Executive Office of the President and was tasked with developing a national energy plan. *Id.* The mission of the NEPDG was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Id.* The expressly delineated functions of the NEPDG were to gather information, deliberate, and make policy recommendations to the President. *Id.* The President assigned the [NEPDG] the task of submitting reports to the President on the difficulties in

ensuring the country's energy needs and setting forth a recommended national energy policy consistent with the group's mission. *Id.* The NEPDG was given a limited duration and was authorized to act only through the end of the 2001 fiscal year. *Id.*

Vice President Cheney was tasked with directing the group, presiding at meetings, and establishing any subordinate groups to assist the NEPDG in its work. *Id.* The memorandum appointed the following individuals as members of the group: Vice President Cheney, the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Director of the Federal Emergency Management Agency, the Administrator of the Environmental Protection Agency, the Assistant to the President and Deputy Chief of Staff for Policy, the Assistant to the President for Economic Policy, and the Assistant to the President for Intergovernmental Affairs. *Id.* The memorandum also stated that the Vice President could also invite, when appropriate, the Chairman of the Federal Energy Regulatory Commission to participate, as well as the Secretary of State, and "other officers of the Federal Government." *Id.* Funding and support staff were to be provided by the Department of Energy ("DOE"), and if necessary, by the National Economic Council and other appropriations available to the President.

On May 16, 2001 the NEPDG issued a public report that recommended a set of policies in the form of administrative actions and proposed legislation. *See* "Reliable, Affordable, and Environmentally Sound Energy for America's Future," Report of the National Energy Policy Development Group, available

at www.whitehouse.gov/energy/National-Energy-Policy.pdf. That report was approved by the President as the National Energy Policy. *Id.* The authority for the NEPDG terminated at the end of the 2001 fiscal year, September 30, 2001. *See* Bush Mem. at 2.

As alleged in Judicial Watch's Complaint, from the start, the [NEPDG] gained the attention of the national media. In particular, the public demand for information about the energy policy development process and identity of the participants in that process has been great. That attention has only intensified with the recent controversy over the highly publicized bankruptcy of the Enron Corporation and allegations of contacts between former Enron Chief Executive Officer Kenneth Lay and the [NEPDG]. Both plaintiffs allege that private individuals and corporations had access to the NEPDG and participated as members of the NEPDG. Sierra Club also alleges that Sub-Groups of the NEPDG were created, which also had private individual members. Both plaintiffs made requests on behalf of their members for information about the NEPDG and had those requests denied by defendants.

II. Procedural History of the Judicial Watch and Sierra Club Lawsuits

On June 25, 2001, plaintiff Judicial Watch wrote to Vice President Cheney expressing its opinion that the [NEPDG] was required to comply with FACA, asking to attend all future NEPDG meetings, and requesting copies of minutes and other documents under FACA and FOIA. Judicial Watch is a self-described non-profit public interest law firm the mission of which includes promoting open government. The Office of the Vice President responded by letter on July 5, 2001 denying Judicial Watch's request and informing Judicial Watch

that the NEPDG was not subject to either FACA or FOIA.

On July 16, 2001, Judicial Watch filed this lawsuit. Judicial Watch initially sued only the [NEPDG], alleging violations of FACA and FOIA. After receiving several extensions of time to file a responsive pleading from this Court, on October 17, 2001, defendant NEPDG moved to dismiss. Defendant NEPDG originally argued that Judicial Watch's complaint failed to state a claim under FACA because the NEPDG consisted solely of federal officials, and that it would violate Article II of the Constitution to apply FACA to this group.

On January 31, 2002, this Court issued an Order setting forth constitutional issues to be briefed in advance of a hearing on the NEPDG's motion to dismiss. That briefing was completed on February 11, 2002. On February 12, 2002, this Court held a hearing at which the Court discussed with government's counsel several problems with the briefs filed by the government in this case. First, although moving to dismiss the complaint, the government had attached and relied on evidence outside the Complaint to support its arguments. This Court inquired why it should not convert the government's motion to a motion for summary judgment pursuant to Federal Rules of Procedure 12 and 56 and proceed immediately to discovery. Furthermore, the Court discussed several serious deficiencies in the legal arguments raised by the government, particularly the government's failure to cite controlling adverse authority from the D.C. Circuit on the issue of mootness, despite government's counsel having also been counsel in those cases. In addition, the Court discussed what appeared to be government

counsel's mischaracterization of Supreme Court precedent on the constitutional separation of powers issue. Defense counsel conceded that it had argued for the application of a constitutional standard that did not reflect controlling law without informing the Court that it was doing so. *See* Tr. 2/12/2002 at 33:17 - 34:1; 35:8 - 35:23; 36:15 - 38:7; 38:20 - 39:1; 39:9 - 40:16.

At that hearing, government's counsel admitted to this Court that the briefs submitted did not represent the government's best efforts, and requested further opportunity to research and brief the important issues raised by this case. Plaintiff also requested the opportunity to amend its complaint to include additional defendants, in light of arguments made by the government with respect to the termination of the sole defendant NEPDG. Despite the serious inadequacies in the government's briefing to date, the Court found that it was in the interest of justice to allow the plaintiff to amend its complaint and the defendant to re-brief its motion to dismiss.

Judicial Watch filed its First Amended Complaint on February 15, 2002, naming Vice President Cheney, the NEPDG, several Cabinet members, and several private individuals as defendants. The federal defendants moved to dismiss the Amended Complaint. Defs.' Mot. of 3/8/02. For the first time, the federal defendants argued, among other things, that Judicial Watch's complaint should be dismissed because FACA affords no private cause of action. Three of the private defendants also moved to dismiss the Amended Complaint on the grounds that neither FACA or FOIA apply to private individuals.

On January 25, 2002, Sierra Club filed suit against Vice President Cheney, the NEPDG, and various

agency officials pursuant to the APA, the federal mandamus statute, and FACA in the United States District Court for the Northern District of California. The government moved to transfer that case to this Court. While awaiting the decision of the Northern District of California on the transfer motion, Sierra Club and Natural Resources Defense Council ("NRDC") were granted leave to file amicus briefs in the Judicial Watch case. On March 21, 2002, the Northern District of California transferred the Sierra Club case to this Court, where it was filed as a related case to the Judicial Watch case. This Court ordered the two cases consolidated under one case number and set forth an expedited briefing schedule.

On April 5, 2002, the federal defendants moved to dismiss the Sierra Club complaint, raising many of the same issues as in their motion to dismiss Judicial Watch's First Amended Complaint. Defs.' Mot. of 4/5/02. In addition, the federal defendants also argued for the dismissal of Sierra Club's claims pursuant to the APA and the federal mandamus statute. Briefing in both cases was completed on April 29, 2002.

This Court held oral argument on the federal defendants' motions to dismiss on May 23, 2002. After hearing argument from both plaintiffs, amicus NRDC, and the federal government, the Court made several rulings by Order issued that same day. First, the Court granted plaintiff Judicial Watch leave to file a second amended complaint to include claims under the APA and the federal mandamus statute that were in substance identical to Sierra Club's claims under those statutes. Second, this Court ordered that it would consider federal defendants' motion to dismiss the Sierra Club complaint and the motion to dismiss Judicial Watch's Second Amended Complaint, along with any supplemental arguments the government would add in the time allotted. Third, the Court granted defendants' motion to dismiss the APA claims against Vice President Cheney and the NEPDG. Fourth, the Court denied all other aspects of the motions to dismiss at that time. Fifth, the Court ordered that this Memorandum Opinion, explaining the Court's decision on the motions to dismiss, would be issued promptly. Finally, the Court ordered the parties to begin to develop a proposed discovery plan, which would be filed soon after this Memorandum Opinion was issued.

On May 28, 2002, Judicial Watch filed a Second Amended Complaint, incorporating the language of Sierra Club's APA and mandamus claims.[3] On June 3, 2002 the federal defendants moved to dismiss, incorporating by reference the arguments made in their motions to dismiss of March 8, 2002 and April 5, 2002. Judicial Watch filed an opposition to that motion, similarly incorporating arguments made in previous filings.

III. Other NEPDG-related Cases Before this Court

In addition to the two consolidated suits before this Court, the activities of the NEPDG are the subject of several other lawsuits and congressional inquiries. Several other FOIA cases are pending before this Court. *See, e.g., Judicial Watch v. Department of Energy*, Civ.

---

[3] Count III of Judicial Watch's Second Amended Complaint exceeded the scope of this Court's order permitting the amendment, as it was also brought against the private defendants who do not appear in the Sierra Club lawsuit. Consequently, this Court dismissed Count III with respect to the private defendants only. *See* Order of May 31, 2002.

Action No. 01-981 (PLF); *Natural Resources Defense Council v. Department of Energy*, Civ. Action No. 01-2545 (PLF). The agency defendants in those FOIA cases have been ordered by this Court to produce responsive documents, and have begun to do so, thereby revealing more information about the operations of the NEPDG than was available at the outset of either of these consolidated cases.

In addition, the General Accounting Office (GAO), on behalf of Congress, filed suit in this Court challenging the White House's refusal to turn over information about NEPDG to GAO pursuant to GAO's investigatory authority. *See Walker v. Cheney*, Civ. Action No. 02-0340(JDB). Information released as a result of these cases may potentially impact the statutory and constitutional issues raised by this case.

DISCUSSION

I. Standard of Review

This Court will not grant the defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

Furthermore, a motion to dismiss is intended to test the sufficiency of the complaint and the complaint

alone.[4] *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Tele-Communications of Key West v. U.S.*, 757 F.2d 1330, 1335 (D.C. Cir. 1985) ("a Rule 12(b)(6) disposition must be made on the face of the complaint alone"). Accordingly, at this stage in the proceedings, the Court must accept as true all of the complaints' factual allegations. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Plaintiffs are entitled to "the benefit of all inferences that can be derived from the facts alleged." *Kowal*, 16 F.3d at 1276.

II. Federal Defendants' Motions to Dismiss

A. Mootness

The federal defendants have moved to dismiss both complaints as moot because the NEPDG terminated pursuant to the terms of the Presidential Memorandum on September 30, 2001. Because at least two forms of relief, an injunction requiring the disclosure of records and a declaration that the government violated FACA, are available, these cases are not moot. *See Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999); *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999). Furthermore, because Judicial Watch has alleged in its Second Amended Complaint that on information and belief the NEPDG is continuing to operate despite the termination of its

---

[4] In response to the initial Judicial Watch Complaint, the NEPDG attempted to rely on facts outside the Complaint to support its motion to dismiss, *see* Defs.' Br. of 2/5/2002 at 9. However, the federal defendants do not rely on materials outside the complaints in the motion filed in response to Judicial Watch's First and Second Amended Complaints, or Sierra Club's complaint and thus this Court need no longer consider the issue of whether conversion to a summary judgment motion is appropriate pursuant to Rules 12(b)(6) and 56.

mandate in the Presidential Memorandum, Judicial Watch's claims are not moot.

It is well settled that the exercise of judicial power authorized by Article III of the U.S. Constitution depends on the existence of a case or controversy. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975). A case is moot when it "has lost its character as a present, live controversy of the kind that must exist if [the court] is to avoid advisory opinions on abstract questions of law." *Schering Corp. v. Shalala*, 995 F.2d 1103, 1106 (D.C. Cir. 1993). Article III is satisfied when, as here, the existence of a "partial remedy" is "sufficient to prevent [a] case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996).

1. *Judicial Watch's Allegations of the Ongoing Existence of the NEPDG*

Judicial Watch's Second Amended Complaint alleges that "[o]n information and belief, the NEPDG is still in existence." Jud. Watch Sec. Amend. Compl. at § 38. The Complaint then alleges that NEPDG members and staff continue to meet to discuss and formulate energy policy. *Id.* However unlikely, this Court can not determine at this stage of the case whether or not this allegation is true, but rather *must* accept it as true for purposes of deciding this motion to dismiss. *Scheuer*, 416 U.S. at 236, 94 S. Ct. 1683. The federal defendants argue in response that "[t]here can be no question that, as a matter of law, the NEPDG no longer exists." Defs.' Mot. of 3/8/2002 at 9. This argument misses the mark. Plaintiff Judicial Watch is not arguing that the legal authority for the NEPDG continues, but that the NEPDG has continued to meet despite the termination of its legal authority. The continued existence of the

NEPDG is not, as defendants contend, a question of law, but is a question of fact that is clearly in dispute.

In the alternative, the federal defendants argue that even if the ongoing existence of the NEPDG is a question of fact, this Court should not accept this fact as true because it is not "well-pled." Defs.' Mot. of 3/8/2002 at 9 n.4. Defendants argue that where there is a disparity between facts alleged in a complaint, and exhibits submitted by the plaintiff in support of the complaint, the exhibit trumps the allegation. *Id.* (citing cases). Defendants point out that the letter attached to Judicial Watch's Second Amended Complaint and cited by Judicial Watch to support its allegation of an October 2001 meeting between NEPDG staff and Enron representatives actually states that the meeting occurred "after the termination of the Group." Jud. Watch Sec. Amend. Compl. Ex. 11, at 2. Defendants are correct that this letter clearly states that this meeting occurred after the NEPDG's termination. Regardless, defendants' argument that Judicial Watch's Second Amended Complaint is not well-pled fails to acknowledge that the Amended Complaint does not simply allege that this one meeting occurred, but that "[o]n information and belief, other meetings between both federal and non-federal members of the allegedly defunct NEPDG have occurred and are still occurring to this day to continue discussions on formulating a national energy policy." Jud. Watch Sec. Amend. Compl. at ¶ 38. At this stage of the proceedings, prior to any discovery, this Court *must* accept these facts as true, no matter how vigorously defendants contest the truthfulness of these allegations.

If the NEPDG does continue to exist and meet to formulate energy policy, this Court can still award the

relief requested by Judicial Watch. Therefore, because Judicial Watch has alleged the ongoing existence of this group, none of Judicial Watch's claims are moot.

2. *Even if the NEPDG no Longer Exists, These Claims are Not Moot*

Unlike Judicial Watch, Sierra Club does not allege that the NEPDG continues to exist, but concedes that the NEPDG terminated on September 30, 2001. However, even if in fact the NEPDG ceased to exist on September 30, 2001, Judicial Watch and Sierra Club's requests for documents and declaratory relief are not moot.

a. *Injunctive Relief*

Both plaintiffs have requested that this Court order the release of documents related to the NEPDG's activities as relief for the alleged violations of FACA. Jud. Watch Sec. Amend. Compl. at 22, ¶ 5, 6; Sierra Club Compl. at ¶ 36. FACA mandates public access to some records of advisory committees:

> Subject to [the requirements of FOIA] the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents, which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying . . .

5 U.S.C. App. 2 § 10(b). This provision "affirmatively obligates the Government to provide access to the identified materials." *Food Chem. News v. Dep't of Health and Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992); *see also Cummock v. Gore*, 180 F.3d 282, 289 (D.C. Cir. 1999). Furthermore, this public access provision applies even where there has been no specific

request made, unless "the agency reasonably claims [the materials] to be exempt from disclosure pursuant to FOIA." *Food Chem. News*, 980 F.2d at 1469; *see also Cummock*, 180 F.3d. at 289. However, this provision does have a time limitation: the documents, "shall be available for public inspection and copying . . . *until the advisory committee ceases to exist.*" 5 U.S.C. App. 2 § 10(b) (emphasis added).

The federal government's statutory duty under FACA to allow the public to inspect and copy documents may be limited in time by the statute, but the ability of a court to award access to the documents as relief for previous violations of that duty is limited only by the existence of the documents. The terms of the statute create the substantive requirements to which the government must adhere—the government must make documents available only while an advisory committee exists. Here, both plaintiffs have properly alleged that the government failed to make documents available during the life of the NEPDG. Whether or not plaintiffs sued before or after the group terminated does not alter the allegation that the government failed to meet the substantive requirements of the statute during the relevant timeframe. Assuming the facts in the complaints to be true, the government violated the public access provisions of the statute. Contrary to the federal defendants' argument here, the terms of the statute limit the scope of liability, not the availability of a remedy.

The Court is free to exercise its discretion to craft equitable relief addressing statutory violations. Indeed, if after discovery this Court determines that a statutory violation has occurred, the Court *must* provide some form of relief. *See, e.g., U.S. v. Oakland*

Cannabis Buyers' Cooperative, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001). Here, one alleged violation is a failure to provide access to documents during the lifetime of the NEPDG. This Court, in its discretion, could determine at some later date that ordering defendants to provide whatever relevant documents still exist is an appropriate remedy for that violation.

Thus, whether the relief is available is contingent not on the continued existence of the group, but on the continued existence of the records and information.[5] In other cases, plaintiffs' claims for documents pursuant to § 10(b) were eventually rendered moot not by the termination of the advisory group but only when the defendants released the documents. *See, e.g., Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999); *Physicians Comm. for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1 (D.D.C. 2000); *Ass'n of Am. Physicians and Surgeons v. Clinton*, 879 F. Supp. 103 (D.D.C. 1994).

The D.C. Circuit has held that a request for documents pursuant to FACA is not rendered moot by the termination of the advisory committee in question. *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). In *Cummock*, the D.C. Circuit reversed a district court opinion that in part dismissed the plaintiff's claim because her request for documents was untimely. The Court held that Cummock had an enforceable right to the documents that were denied to her during the committee's existence and remanded for the District Court to determine precisely what information Cummock was

[5] At the hearing on February 12, 2002, when government's counsel acknowledged that relevant documents still exist, this Court ordered the government to maintain those documents for the duration of this lawsuit.

entitled. 180 F.3d at 292- 93. The primary argument by the government in *Cummock* was that the plaintiff, as a member of the advisory committee in question, had no cause of action under FACA for access to records. The Court rejected the government's argument, holding that a member of an advisory committee has an even greater right of access than does the public under § 10(b), but in so holding discussed the parameters of the public's right. The Court explained:

> In any event, the Government does not dispute that committee members have at least the same rights under FACA as the public. Although we disagree with the Government's position that the rights of a committee member extend no further than the rights of a non-member, even taking only this limited view, the Government's concession is significant. *Because there is no question under our precedent that members of the public possess enforceable rights to obtain information under FACA, see Food Chem. News*, 980 F.2d at 1472, it follows a fortiori that committee members have at least these same rights. *And we have also made it clear that FACA rights are enforceable even after an advisory committee has been disbanded. See, e.g., Byrd*, 174 F.3d 239, 243-44 (rejecting argument that plaintiff's injury was not redressable where panel had already completed its work and been disbanded).

180 F.3d at 292 (emphasis added).

The holding of the D.C. Circuit in *Cummock* is clear: "Cummock clearly possesses an enforceable right to information under FACA, because any member of the public possesses such a right. Moreover, Cummock possesses an even greater right than a member of the

public, because, as a Commission member, she is entitled to fully participate. . . ." *Id.* at 292. In so holding, the D.C. Circuit was attempting to be faithful to legislative intent. With respect to the public access provision, § 10(b), the legislative history explains:

> This provision has the effect of assuring openness in the operations of advisory committees. This provision coupled with the requirement that complete and accurate minutes of committee meetings be kept serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group. Along with the provisions for balanced representation contained in Sec. 4 of the bill, this requirement of openness is a strong safeguard of the public interest.

H.R. Rep. 92-1017, *reprinted in* 1972 U.S.C.C.A.N. at 3491. The surreptitious use of advisory committees by special interest groups could necessarily result in a lack of knowledge about the group's activities, as exemplified by the allegations in this case. It is entirely conceivable that only after the fact would the public become aware of a group's existence and activities, and only after the fact could the public then claim its right of access to documents. In addition, mandating that a court's ability to enforce the FACA record-keeping requirement ends with the termination of the advisory committee would create an odd incentive for the government to terminate any problematic advisory group to avoid shedding light on its activities.

Defendants try to distinguish *Cummock* by arguing that *Cummock* applies only to suits by members of an advisory committee. *See* Defs.' Mot. of 3/8/2002 at 10. But the passage cited above clearly assumes for sake of

argument that "that the rights of a committee member extend no further than the rights of a non-member," and then states that "members of the public possess enforceable rights to obtain information under FACA" and that "FACA rights are enforceable even after an advisory committee has been disbanded." 180 F.3d at 292. Furthermore, the Court held that "Cummock clearly possesses an enforceable right to information under FACA, because any member of the public possesses such a right." *Id.* Contrary to defendants' argument, these conclusions are not dicta, but are central to the D.C. Circuit's reasoning and holding. In order to determine what rights Cummock possessed, the Court reasoned that Cummock must have at least as many rights as the public, which include the right to documents after the committee has been disbanded.

Finally, defendants argue that *Cummock* cites only one case, *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999), to support the conclusion that a claim for documents is not moot beyond the life of the committee, and therefore is limited to the scope of *Byrd*. *Byrd* held that a request for declaratory relief under FACA was not mooted by the dissolution of the advisory committee at issue. *Id.* at 244. Thus, defendants argue that *Cummock's* citation to *Byrd* "can only be understood to be a reference to the limited declaratory relief at issue in *Byrd*." Defs.' Mot. of 3/8/02 at 11 n.7. Defendants fail to recognize that the D.C. Circuit in *Cummock* extended the general proposition in *Byrd* that relief can exist beyond the life of the committee to claims for other relief. Insofar as *Cummock* is an extension of the holding in *Byrd*, it is an extension that is binding on this Court.

Defendants also argue that after the termination of an advisory committee, FOIA provides the only statu-

tory right of access to documents. In the absence of a FACA violation, this may be an accurate statement. If the government complies with FACA, and provides documents in a reading room until the committee ceases to exist, and a citizen wants to access those documents at some time after the termination of the committee, that citizen would have to file a FOIA request to a proper agency defendant for those documents. But that scenario is not what plaintiffs have alleged here. When the government violates FACA, the question is not what other statutes could also provide a right of access, but what options are available to this Court to remedy that statutory violation.

Finally, defendants also argue that plaintiffs' claims are moot because they did not request a preliminary injunction to preserve the records at issue here. Indeed, plaintiffs could have moved for a preliminary injunction to require defendants to maintain the relevant documents. However, plaintiffs were in no way required to request such preliminary relief in order to maintain the controversy. Relief is available as long as relevant documents exist.

b. *Declaratory Relief*

Defendants also argue that plaintiffs' request for a declaratory judgment that defendants violated FACA is moot. Defendants argue that, because all other claims for relief are moot, the claim for declaratory relief cannot survive alone, *citing City of Houston v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 994). As explained above, the claims for injunctive relief regarding the documents are not moot in this case, so this argument by defendants fails. However, even if all the other claims for relief were moot, this Court would follow the D.C. Circuit's holding in *Byrd*

that a claim for declaratory relief is not mooted by the termination of the committee. 174 F.3d 239 (D.C. Cir. 1999).

In conclusion, Judicial Watch's claims are not moot because it has alleged the ongoing existence of the NEPDG. Regardless of the likelihood of the truth of these allegations, this Court must accept them as true for purposes of deciding these motions. In addition, Sierra Club's claims are not moot because this Court can remedy any alleged violations of FACA, the APA, and the mandamus statute with injunctive and declaratory relief.

B. FACA Claims

1. *FACA Provides No Private Cause of Action*

Both Judicial Watch and Sierra Club allege that the activities of the NEPDG are subject to FACA because the group was established by the President to provide advice on energy policy, and had members who were not full-time federal employees. Both Judicial Watch and Sierra Club further allege that the activities of the NEPDG violated all the procedural requirements of FACA by failing, for example, to provide public notice of meetings, public access to meetings, and public access to minutes and documents generated by the NEPDG. Sierra Club also alleges that in addition to the NEPDG, defendants established and utilized "Sub-Groups" of the NEPDG, which also had private members and which also were subject to and violated FACA's requirements.

In response to these allegations, defendants argue that Judicial Watch and Sierra Club's claims pursuant to FACA should be dismissed because there is no

private right of action under FACA.[6] While both Sierra Club and amicus NRDC concede that there is no private cause of action under FACA, Judicial Watch contends that there is. However, in the event that this Court should be convinced by the government's argument with respect to FACA, at oral argument Judicial Watch requested and was granted leave to amend its complaint to include claims under the APA and federal mandamus statute.

Notwithstanding the many previous cases in which courts have implicitly recognized a private right of action pursuant to FACA, in light of the Supreme Court's recent decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), this Court has no choice but to hold that FACA creates no private right of action. *Sandoval* makes very clear that courts can not read into statutes a cause of action that has no basis in the statutory text. 532 U.S. at 286-87, 121 S. Ct. 1511 ("Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.") (internal citations omitted). The *Sandoval* Court rejected any attempt to "revert in this case to the understanding of private causes of action that held sway 40 years ago" that would allow courts to imply a cause of action where consistent with the purpose of the statute at issue. *Id.* Regardless of how allowing such a private cause of action may further the purposes of FACA, nothing in the text of FACA

[6] Defendants did not make this argument in their original motion to dismiss the Judicial Watch claims, but raised it only in response to Judicial Watch's First Amended Complaint. *See* Defs.' Mot. of 3/8/02.

supports a private right to sue. The statutory language may create rights and duties that have been recognized by courts in the past. *See, e.g., Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). However, language that creates a right is insufficient to create a right to sue. The *Sandoval* Court made clear that the statute must provide not only a private right but also a private remedy. 532 U.S. at 286-87, 121 S. Ct. 1511.

Nothing in the language of FACA evidences any intent to create such a remedy. Precedent does not require this Court to hold otherwise. It is true that several cases have been brought pursuant to FACA apparently without incorporating the FACA violation into a corresponding APA claim. *See, e.g., Public Citizen v. Dep't of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989); *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999); *Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). Apparently, in all of these cases, the courts assumed that FACA provided a cause of action. None of the cases addressed the issue of whether Congress created a private right to sue under FACA. This Court cannot rely on an implicit assumption, even an assumption made by the Supreme Court, when a later Supreme Court decision makes clear that the requisite statutory language is lacking here.

However, defendants overstate the amount of precedent that supports their position that a plaintiff must sue under the APA to enforce FACA. Defendants cite cases from the D.C. Circuit, *Claybrook v. Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997), *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424, 430 (D.C. Cir. 1997), *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994), and one case from

this Court, *Fertilizer Institute v. EPA*, 938 F. Supp. 52, 54 (D.D.C. 1996), for the proposition that "judicial review of FACA claims is available only through the APA." Defs.' Reply of 4/26/02 at 5. Yet none of the D.C. Circuit cases cited by defendants hold this.[7]

The *Fertilizer Institute* case does clearly hold that "[s]ince FACA contains no provision for judicial review, the availability if such review must derive from the APA." 938 F. Supp. at 54. However, one other case from this Court, cited by plaintiff Judicial Watch, holds the opposite: that FACA does create a private cause of action. *Washington Legal Found. v. American Bar*

---

[7] *Claybrook v. Slater* involved a challenge under FACA to the decision of an agency representative not to adjourn an advisory committee meeting. 111 F.3d at 906. The D.C. Circuit affirmed the District Court's dismissal of the action for lack of standing, reasoning that the plaintiff had no legally cognizable injury because the action at issue was committed to agency discretion. *Id.* In so holding, the Court stated, "the Administrative Procedure Act . . . governs judicial review of agency actions." *Id.* at 908. While the D.C. Circuit did analyze that FACA claim, brought against the Federal Highway Administration, under the APA, it did not hold that a FACA claim was *only* available under the APA. The case says nothing about whether and how FACA claims brought against entities in the government that are not agencies for APA purposes can proceed.

Neither *Animal Legal Defense Fund v. Shalala* nor *Washington Legal Foundation v. U.S. Sentencing Commission* address the availability of a private right of action under FACA. 104 F.3d 424, 17 F.3d 1446. The language with respect to the APA incorrectly cited by defendants here, comes from a discussion of whether the Sentencing Commission qualifies as an "agency" for purposes of FACA. FACA incorporates the definition of "agency" used in the APA; thus, with respect to what qualifies as an agency, the APA "determines FACA coverage." 104 F.3d at 430. Neither of these cases addresses whether FACA contains a private right to sue.

Ass'n Standing Comm. on the Fed. Judiciary, 648 F. Supp. 1353, 1361 (D.D.C. 1986).

Notwithstanding the relative confusion that exists within the FACA doctrine with respect to this question, the Supreme Court's standard is now clear: this Court cannot read into a statute a cause of action that Congress has not expressly created. *Sandoval*, 532 U.S. at 286, 121 S. Ct. 1511. Consequently, Judicial Watch and Sierra Club's claims pursuant to FACA must be dismissed.

C. APA Claims

Plaintiffs allege that by failing to comply with FACA, the defendants have acted arbitrarily and capriciously, not in accordance with law, and without observation of procedure required by law, in violation of the APA. 5 U.S.C. § 706(2)(A) and (D) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law . . . (D) without observance of procedure required by law"). Defendants argue that plaintiffs have failed to state a claim under the APA because many of the defendants are not "agencies" and therefore not liable pursuant to the APA. For those defendants that are covered by the APA, defendants argue that plaintiffs have not identified the requisite "final agency action."

Plaintiffs' APA claims against two of the named defendants, Vice President Cheney and the NEPDG, were dismissed by this Court on May 23, 2002. Plaintiffs have alleged sufficient final agency action with respect to the remaining agency defendants for this Court to deny the motions to dismiss.

1. *Non-Agency Defendants*

Judicial Watch and Sierra Club have named as defendants the following: Vice President Richard Cheney, the NEPDG, Andrew Lundquist, Executive Director of NEPDG and Director of Energy Policy for Cheney and Senior Policy Advisor to the DOE, Spencer Abraham, Secretary of DOE, Donald Evans, Secretary of Commerce, Gale Norton, Secretary of the Interior, Ann Veneman, Secretary of Agriculture, Paul O'Neill, Secretary of the Treasury, Norman Mineta, Secretary of Transportation, and Christine Todd Whitman, Administrator of the EPA. Defendants argue that the Vice President, the NEPDG, and any alleged NEPDG subgroups are not "agencies" for purposes of the APA.

a. *Vice President Cheney*

Sierra Club[8] concedes that Vice President Cheney is not an agency for purposes of the APA. Sierra Club's Opp'n at 7 n.3. Thus, this Court need not resolve the question of whether the Vice President may ever be an "agency" for purposes of the APA, thereby avoiding a difficult constitutional question. *See Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (emphasizing doctrine of constitutional avoidance); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 800-01, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992) (holding that separation of powers concerns

[8] Judicial Watch has opposed the federal defendants' motion to dismiss its Second Amended Complaint by incorporating by reference the arguments previously made in its opposition briefs and the briefs of Sierra Club and NRDC. *See* Jud. Watch Opp'n of 6/7/02. Because Judicial Watch has adopted Sierra Club and NRDC's arguments with respect to the APA claims in their entirety, the concessions made by Sierra Club and NRDC with respect to these claims similarly apply to Judicial Watch.

prevent the application of the APA to the President); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (suggesting that the Vice President should not be subject to FOIA).

b. *NEPDG*

Because Sierra Club has conceded that the NEPDG no longer exists, any APA claim brought directly against the NEPDG must be dismissed. Even though Sierra Club's FACA claims with respect to the federal defendants are not moot, if the NEPDG no longer exists, then it can not be sued as a defendant. Thus, the Court need not resolve the question of whether the NEPDG or its alleged sub-groups were sufficiently independent to qualify as an "agency" for purposes of the APA.[9]

2. *Agency Defendants and Final Agency Action*

Defendants concede that the cabinet members sued by plaintiffs are agency actors, and can generally be sued pursuant to the APA for agency action. Defs.' Mot. of 4/5/02 at 12. Section 704 of the APA states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. It is uncontested that the actions in question are not made reviewable by statute, so in order to state a claim under the APA, plaintiffs must identify a "final agency action." Defendants argue that the APA claims against these agency defendants must be dismissed because plaintiffs have not done so.

[9] Furthermore, Sierra Club admits that it included the NEPDG as a defendant "in order to preempt any 'shell game' tactic defendants may employ to withhold Task Force records, and for the sake of clarity." Sierra Club's Opp'n of 4/16/02 at 8 n.6.

Plaintiffs argue that the agency heads named as defendants established and utilized the NEPDG and the NEPDG Sub-Groups and that the "agencies under the control of the named agency defendants have denied [plaintiffs] access to proceedings and records". Sierra Club's Opp'n of 4/16/02 at 9. To be specific, the particular FACA violations alleged to have been caused by defendants are:

- Failure to open each meeting to the public.
- Failure to publish timely notice of each meeting in the Federal Register
- Failure to allow public attendance or statements before the meetings
- Failure to make available for public inspection and copying the records of the NEPDG.
- Failure to keep detailed minutes of each meeting.
- Establishing Sub-Groups without Presidential authorization or notice in Federal Register.
- Failure to file an advisory committee charter.

Sierra Club Compl. at ¶ 31; Judicial Watch Sec. Amend. Compl. at ¶ 54.

The question before this Court is twofold: whether the actions or lack thereof that caused the alleged FACA violation are "agency action," and whether those actions or inactions are "final." Plaintiffs allege that the agency defendants were at least in part responsible for the decision-making processes that lead to the FACA violations. Specifically, Sierra Club alleges that the various agency defendants "participated in" the

NEPDG meetings and deliberations, and "gathered information, advice, and recommendations on national energy policy and supervised the work of the [NEPDG]." Sierra Club's Compl. at ¶¶ 9-15. Furthermore, "defendants arranged, participated in and exercised responsibility over meetings and other activities involving [Task Force Sub-Groups]." *Id.* at ¶ 18. In addition, Sierra Club alleges that the "participants in [NEPDG] and the Task Force Sub-Groups interacted significantly and acted collectively in expressing their viewpoints and advice on energy policy." *Id.* at ¶ 20. Sierra Club also alleges that "[t]he [NEPDG] and the Task Force Sub-Groups were established or utilized by the President and the defendants." *Id.* at ¶ 23. Finally, "defendants have refused to provide information to Congress, the General Accounting Office, or the public (including the Sierra Club) concerning" the NEPDG. *Id.* at ¶ 24.

Plaintiffs are entitled to the benefit of all inferences from the facts alleged. From the allegation that defendants caused these violations it could be possible that the group comprised of the agency defendants, the Vice President, and private individuals acted collectively to make the decisions to hold meetings that were not open to the public, to hold meetings for which minutes were not kept and were not made public, to hold meetings for which no notice was published in the Federal Register, to create draft reports and other records that were not made public, and to meet and work on policy recommendations without filing an advisory committee charter. Given the structure of the NEPDG outlined in the Presidential Memorandum, it is possible, or even likely that these decisions were not made collectively, but in fact were made by the Vice

President acting as the head of the group. However, "[i]ndeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed .2d 90 (1974). This Court will not grant a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) unless a plaintiff can prove no facts in support of his claim. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Here, if plaintiffs can prove that decisions were made collectively by this group, those can constitute agency action for purposes of the APA.

Furthermore, in addition to holding meetings of the NEPDG that allegedly violated FACA's access requirements, plaintiffs also allege that the agency defendants established and controlled the Task Force Sub-Groups. Plaintiffs allege that these Sub-Groups, comprised of NEPDG members and private individuals, also constituted advisory committees for purposes of FACA and also operated in violation of FACA and the APA. Specifically, Sierra Club alleges that "defendants arranged, participated in and exercised responsibility over meetings and other activities involving [Task Force Sub-Groups]." *Id.* at ¶ 18. Judicial Watch similarly alleges that defendants established the Sub-Groups. Jud. Watch. Sec. Amend. Compl. at ¶ 54(f). Once again, it is possible reasonably to infer from these allegations that an agency head, or a group of agency heads collectively or individually made the decision to establish and oversee particular Sub-Groups.

In response, the federal defendants argue that the decisions of the NEPDG were made by the President,

who established the group, and the Vice President, who ran the group, rather than the agency participants. The assertion that no relevant decisions were made by the agency heads is a question of fact that cannot be determined without discovery. The fact that the Presidential Memorandum that established the NEPDG delegated authority to the Vice President to head the NEPDG is not conclusive with respect to how decisions were actually made. Did the Vice President set the dates and times of the meetings? Did the group collectively come to a decision to hold a meeting or conduct other activities? If these Sub-Groups did in fact exist, who made the decision to establish them? Who made the decision as to when and where the Sub-Groups would meet, and what role they would play in the policy-making process? Construing the facts in the light most favorable to plaintiffs, this Court must assume for purposes of this motion that the decisions at issue were made in part by the agency defendants.

Thus, the question before this Court is whether collective decisions by such a group, including several agency heads, to hold meetings that allegedly violated the FACA requirements and to establish and control Task Force Sub-Groups, can be considered first, agency action, and second, final agency action pursuant to the APA. Defendants argue, "[i]n the context of advisory committees, the agency that charters a committee and to which a committee reports can engage in final agency action, but individual members of an advisory committee cannot." Defs.' Reply of 4/26/02 at 12. Defendants' primary justification for why the actions of the agency heads cannot be considered agency action is that these individuals acted only as participants in a

policy-making group, and were not making decisions on behalf of their agencies.

According to § 10 of the APA, 5 U.S.C. § 701(b)(2), "agency action" has the meaning given to it by 5 U.S.C. § 551. That definition of "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13). That section further defines "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making. . . ." 5 U.S.C. § 551(6). According to the legislative history of the APA:

> The term 'agency action' brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction.

S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946). As the D.C. Circuit has explained, "the Act defines agency action as 'the whole or a part of an agency rule, order, license, sanction, relief, of the equivalent or denial thereof, or failure to act.' . . . . Id. § 551(13). These categories are imprecise, and courts have made the threshold determination of reviewable agency action on a case-by-case basis." *Industrial Safety Equipment v. EPA*, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

The type of actions and inaction challenged here, creating sub-groups of the Task Force, holding meetings, refusing to disclose documents, failure to comply with FACA's other procedural requirements, certainly

fall within the broad category of "agency power" Congress intended to include in this definition of agency action. S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946) ("to assure the complete coverage of every form of agency power, proceeding, action, or inaction."). The government can not seriously challenge the type of action taken here as not the type of action covered by this definition. Whether that action can be ascribed to an agency, and whether that action is sufficiently final, are two more difficult questions.

If indeed the decisions to hold NEPDG meetings in private and to create and operate the Sub-Groups were made collectively or in part by the agency heads, can these decisions be ascribed to the agencies? This Court can not detect any case law discussing whether an action taken by a Cabinet member in an advisory capacity should be ascribed to the agency for purposes of the APA. Here, the D.C. Circuit's discussion of the difficulty of distinguishing between the dual role of policy advisor and agency head played by Cabinet officials in the context of a FOIA suit in *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980), is helpful.

The question before the D.C. Circuit in *Ryan* was whether documents within the control of the Attorney General and generated for the purpose of advising the President on judicial nominations are "agency records" for purposes of FOIA. The Circuit reversed the District Court's grant of summary judgment to defendants and ordered the court to enter summary judgment in favor of plaintiffs, holding that such documents were agency records. The D.C. Circuit held that there was no basis for "distinguishing between the Attorney General and the Department of Justice, in such a way that the former is not an 'agency' where he functions in a

purely advisory capacity to the President." 617 F.2d at 786-87. The Court emphasized the dual role played by the Attorney General as advisor to the President and administrator of the Department of Justice, and stated "[t]he same dual role would be true, to a greater or lesser extent, of all other Cabinet officers." *Id.* at 787. The Court then held that there was no "meaningful distinction" between documents generated and kept at DOJ on the basis of the dual roles. *Id.*

Similarly, with respect to the APA, there is no statutory basis for distinguishing between actions taken by an agency head as an advisor to the President and actions taken as the administrator of the agency. Just as rendering advice on judicial nominations was within the scope of the Attorney General's power both as an advisor and as the head of the Department of Justice, so too is rendering advice on energy policy within the scope of the dual roles of many of the Cabinet members sued here, particularly the Secretary of Energy. *Id.* at 787. As the D.C. Circuit explained, "[j]udicial nominations are by no means unique as an instance where normal agency functions involve some element of giving advice to the President." *Id.*

The D.C. Circuit held that "[o]nce a unit is found to be an agency, this determination will not vary according to its specific function in each individual case," and "[a]ny unit or official that is part of an agency and has non-advisory functions cannot be considered a non-agency in selected contexts on a case-by-case basis." *Id.* at 788-89. There is a compelling argument for applying this holding of *Ryan* to APA claims. The same difficulties attend to distinguishing between decisions made or actions taken by agency heads in a purely advisory context or as the head of the agency for purposes

of the APA. The Secretary of Energy provides the strongest example of such difficulty-soliciting opinions and rendering advice on energy policy to the President is part and parcel of the Secretary's duties as the head of the DOE. It would be unrealistic to say that when involved in a group designed to create energy policy the Secretary of Energy sheds his role as the head of the DOE and acts only as an advisor to the President. Furthermore, these individuals were selected to participate in this policy-making process by virtue of their positions as the various Secretaries of administrative agencies.

Moreover, in addition to the arbitrariness involved in attempting to draw a distinction between the dual roles of Cabinet members, the D.C. Circuit also rejected such line-drawing because it would undermine the purposes of FOIA. *Id.* at 788. So too would such line-drawing, in this case, undermine the purposes of the APA. Given the vast number of agency actions that include an element of advice-giving, to hold that a decision made by the head of an agency while serving in an advisory role to the President is not subject to the APA would render a large number of agency actions unreviewable. This would not comport with Congress' intent to include within the scope of the APA "every form of agency power." S. Doc. No. 248, 79th Cong., 2d Sess., at 255 (1946).

Thus, for the reasons articulated by the D.C. Circuit in *Ryan*, this Court holds that an action that otherwise would qualify for the APA's definition of "agency action" does not fall outside the coverage of the APA simply because the agency head acts in an advisory capacity to the President. The more important inquiry

is whether that action is sufficiently final for APA purposes.

The Supreme Court clearly stated the definition of "final agency action" in *Bennett v. Spear:*

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S. Ct. 431, 437, 92 L.Ed. 568 (1948)—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S. Ct. 203, 209, 27 L. Ed. 2d 203 (1970).

520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). The decisions in question—to create and supervise Task Force Sub-Groups, to hold meetings closed to the public and without complying with the various procedural requirements of FACA—were not tentative or interlocutory. Plaintiffs are not challenging decisions made by low level agency actors that were subject to the review of their supervisors. Plaintiffs are challenging decisions allegedly made on behalf of an agency by the head of that agency. Nothing in the allegations indicates that the actions challenged were later corrected or reversed by the same or other decision-makers. As decisions allegedly made by the head of an agency, these actions marked the consummation of the decision-making process.

Second, these actions determined "rights or obligations" and created "legal consequences." 520 U.S. at 178, 117 S. Ct. 1154. The decisions to hold meetings without public access to the meetings or the records created indeed had a legal consequence—the denial of the public's right of access to that information. Plaintiffs and other interested groups and citizens were prevented from enforcing their right to access information that exists pursuant to FACA. Subsequent actions taken without granting access, and the failure to grant access itself, constitute final agency action.

Defendants argue that recognizing the denial of information as a final agency action confuses the APA standard with FOIA. FACA imposes no requirements on individual committee members, argues defendants, so any denial of information by individual committee members cannot violate the law. Plaintiffs, however, are not challenging an individual denial of access to a particular information request. FACA obligates the government to make open and available to the public the meetings and records of advisory committees generally, without respect to any particular request. That general failure to do so here is what plaintiffs challenge, not the particular response to their particular requests for access. Thus, any particular denial of access to Judicial Watch or Sierra Club is only relevant insofar as it reflects a general denial of public access.

Once again, the standard to be applied by this Court is not whether the factual scenario that describes final agency action is likely to have occurred here. All that is required for plaintiffs to survive defendants' motions to dismiss is for such a factual scenario to be possible. Plaintiffs have alleged sufficiently final agency action here to survive.

3. *Andrew Lundquist*

Defendants argue that all claims against Andrew Lunquist, sued by both Judicial Watch and Sierra Club, should be dismissed because Lundquist no longer works for the government. Such a factual determination is inappropriate at this stage of this case. Defendants may be able to establish these facts through discovery. However, this Court can not accept the unsupported factual allegations of defense counsel with respect to Mr. Lundquist's employment status.

D. Mandamus Statute

Plaintiffs have also sued defendants pursuant to the federal mandamus statute, 28 U.S.C. § 1361, arguing that this Court has the authority to remedy defendants' violation of a nondiscretionary duty created by FACA. The federal mandamus statute states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The parties dispute the meaning of this statute. The federal defendants argue that the mandamus statute cannot provide jurisdiction to hear claims based on a violation of another statute if that other statute does not provide a private cause of action. Plaintiffs argue that the mandamus statute provides both a cause of action and jurisdiction where another statute imposes a non-discretionary duty on a federal official and where no other relief is available.

1. *Cause of Action*

Defendants argue that "[t]he federal mandamus statute may provide jurisdiction for an otherwise existing cause of action, but it does not provide a plaintiff with a

cause of action. . . . That means a statute that does not provide a right of action cannot be enforced through mandamus." Defs.' Reply of 4/26/02 at 6. While citing a case from this Court to support their argument, *Public Citizen v. Kantor*, 864 F. Supp. 208, 213 (D.D.C. 1994), defendants fail to cite controlling authority from the D.C. Circuit, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), that holds just the opposite.

The plaintiffs in *Reich* challenged the authority of the President to issue an Executive Order authorizing the Secretary of Labor to disqualify federal employers who hire strike replacements from federal contracts, arguing that the Executive Order was preempted by the National Labor Relations Act (NLRA). The D.C. Circuit held that while the APA did not support plaintiff's challenge to the Executive Order because plaintiffs had not identified any agency action, the Court could review legality of Order on a non-statutory basis. *Id.* at 1327 (*citing* Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 HARV. L. REV. 308, 321 (1967)).[10] Specifically, the Court held, "[i]f a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action." *Id.* While the D.C. Circuit in *Reich* does not identify the "non-statutory" basis of review as a writ of mandamus or the mandamus statute, the cases

[10] The Byse and Fiocca law review article explains that while mandamus actions in federal court are technically statutory actions pursuant to § 1361, they are commonly referred to as non-statutory judicial review actions because of the traditional availability of the writ of mandamus as a source of nonstatutory relief. *See* Byse and Fiocca, 81 Harv. L. Rev. 308, 355 n.51 (1967).

it relies upon in this discussion are mandamus cases, and a later D.C. Circuit case, *Washington Legal Foundation v. United States Sentencing Comm'n*, confirmed that indeed *Reich* concerned mandamus. 89 F.3d 897, 901 (D.C. Cir. 1996).

Neither plaintiffs nor defendants cited or discussed the *Reich* holding in their briefs, or the issue of whether *Reich* overrules the *Kantor* decision from this Court. Defendants are correct that *Kantor* clearly held that the mandamus statute does not provide a source of review where judicial review is otherwise precluded. 864 F. Supp. at 213. However, regardless of the holding of this Court in *Kantor*, *Reich* overrules that decision.

At oral argument, defendants attempted to argue that the Supreme Court's holding in *Sandoval*, 532 U.S. at 286-87, 121 S. Ct. 1511, with respect to the existence of statutory rights of action overrules *Reich*. However, *Sandoval* in no way conflicts with the holding of *Reich*. The *Sandoval* Court was concerned about the constitutionality of an Article III Court reading into a statute a cause of action that Congress had not explicitly created. *Id.* Here, there is no such concern because Congress itself created the mandamus statute.

Following *Reich*, this Court holds that the mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action. Accordingly, this Court must now turn to the question of whether FACA creates such a duty.

2. *Non-Discretionary Duty*

When a federal official has an obligation to perform a ministerial or non-discretionary duty, a federal district court may issue a writ of mandamus under § 1361 to

compel that officer to fulfill the obligation. *National Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980). However, mandamus is a "drastic remedy, to be invoked only in extraordinary situations." *Consolidated Edison Co. of New York v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002); *In re Papandreou*, 139 F.3d 247, 249 (D.C. Cir. 1998). As the Supreme Court has explained, a "ministerial duty" must be "so plainly prescribed as to be free from doubt and equivalent to a positive command. . . . [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur v. United States*, 281 U.S. 206, 218-19, 50 S. Ct. 320, 74 L.Ed. 809 (1930) (*quoted in Consolidated Edison*, 286 F.3d at 605).

Plaintiff identifies several non-discretionary duties imposed by FACA. However, the only duties that are relevant here are those that are not moot. *See Gray v. Office of Personnel Management*, 771 F.2d 1504, 1514 (D.C. Cir. 1985) (holding a mandamus claim moot where requested duty was subsequently performed). With respect to plaintiff Sierra Club, because it has conceded that the NEPDG no longer exists, several of the non-discretionary duties imposed by FACA, such as opening meetings to the public, and providing notice of meetings in the Federal Register, can no longer be ordered by this Court.

As discussed above with respect to mootness, however, one claim for injunctive relief remains available to Sierra Club: the requirement that records related to the advisory committee's work be made public, 5 U.S.C. App. 2 § 10(b). In other words, the requested relief is

not rendered moot by the termination of the advisory committee or the language in the statute "until the advisory committee ceases to exist." That request for relief would only be rendered moot by the disclosure of the documents to plaintiff. *See, e.g., Gray v. Office of Personnel Management*, 771 F.2d 1504, 1514 (D.C. Cir. 1985) (holding a mandamus claim moot where requested duty was subsequently performed); *see also Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999) (FACA claim moot when government released documents); *Physicians Comm. for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1 (D.D.C. 2000) (same).

The duty to make documents related to an advisory committee available to the public is non-discretionary. Section 10(b) states:

> Subject to [the FOIA], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. App. 2 § 10(b). The language of this section leaves no room for discretion: the records "shall be available for public inspection." *Id.* The Supreme Court has stated that by using "shall" in a civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied." *United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989); *see also Pierce v. Underwood*,

487 U.S. 552, 569-70, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (Congress' use of "shall" in a housing subsidy statute constitutes "mandatory language"); *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739 n. 15, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981); Black's Law Dictionary 1233 (5th ed. 1979) ("As used in statutes . . . [shall] is generally imperative or mandatory."). The mandamus statute does allow for the possibility of invoking FOIA exemptions to protect some documents. That exception to the public disclosure rule does not, however, introduce discretion into the statutory mandate. If no FOIA exemption applies to the documents in question, the documents "shall be made available." § 10(b)

With respect to the claims made by Judicial Watch, because Judicial Watch alleges that the NEPDG continues to exist, none of the duties created by FACA are moot. In addition to the duty to make documents publically available, FACA creates several other duties, that by virtue of the use of the word shall, Congress has made nondiscretionary. *See* 5 U.S.C. App. 2 § 10(a)(1) (meetings shall be public); § 10(a)(2) (timely notice shall be published); § 10(a)(3) (interested persons shall be permitted to attend, subject to reasonable rules and regulations); § 10(b) (records shall be made public); § 10(c) (minutes shall be kept and shall contain a record of persons present, complete description of matters discussed and conclusions reached, and the accuracy of such minutes shall be certified by chairman); § 11(a) (transcripts shall be made available at cost).

Defendants' sole argument with respect to whether the duties imposed by FACA are discretionary is that FACA imposes no duty on either the Vice President or the individual members of an advisory committee.

Defs.' Mot. of 4/5/2002 at 15 ("neither the Vice President (who is not an 'agency head') nor any individual member of a FACA committee is singled out for specific duties under the statute."). Plaintiffs respond that a statute need not single out the specific official on which it imposes a duty in order for that duty to be nondiscretionary. Defendants cite no cases in support of their argument that the statute must single out the relevant individuals by name or title. This argument ignores the Supreme Court's guidance in *Marbury v. Madison:* "[i]t is not by the office of the person to whom the writ is directed, but the nature of thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." 5 U.S. (1 Cranch) at 170. The relevant question is whether, in light of the facts as alleged in the complaints, the duty to make records public or comply with any of the other above-listed duties, could have fallen on any of the defendants. The statute does not specify who shall be responsible for this duty. As discussed above, it is possible that the Vice President had final responsibility for all decisions with respect to the NEPDG, in which case, the duty to allow public access to the records would appear to fall on his shoulders. It is possible that the NEPDG made decisions collectively, in which case the responsibility could fall on the shoulders of all members.

What is clear from the statute is that some government official, whether it is the Vice President or the NEPDG participants or someone else, has a duty pursuant to FACA if the facts as alleged are proven. To whom that non-discretionary duty falls is a question to be explored in discovery. At this stage of the case, however, the Court need only acknowledge that FACA creates non-discretionary duties, and that, according to

plaintiffs' allegations, one of the defendants sued here could have violated those duties.

3. *Should This Court Exercise Its Mandamus Discretion?*

Even where a duty is clear and nondiscretionary, whether or not to issue the writ of mandamus is a determination committed to the discretion of this Court. *Cartier v. Sec. of State*, 506 F.2d 191, 199 (D.C. Cir. 1974); *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974). While mandamus is not necessarily precluded where the official is the President or Vice President of the United States, separation of powers concerns may impact the exercise of this Court's discretion. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (declining to issue writ of mandamus despite duty of President to issue pay raise out of respect for separation of powers).

At this stage of the case, it would be premature and inappropriate to determine whether the relief of mandamus will or will not issue. Certainly whether relief is available under the APA will be relevant to whether the mandamus relief requested will be necessary. It is sufficient to determine that plaintiffs have stated a claim for relief under the mandamus statute. Whether or not plaintiffs will prove that claim remains to be seen.

E. Constitutional Separation of Powers Concerns

The constitutional question suggested by this case is whether Congress can pass a law granting the public access to the deliberative process of a formally constituted group of the President's advisors when at least one of those advisors is a private individual without

violating Article II. The application of FACA to this group, argue defendants, interferes with the President's constitutionally protected ability to receive confidential advice from his advisors, even when those advisors include private individuals. Resolving that constitutional question, however, is premature at this stage of the proceedings. The government would have this Court answer that question in the negative now and dismiss the case without ever providing any discovery into the nature and number of the meetings at issue, the identities of the participants, the nature of the group's interaction with the President, the role of the Vice President in the group, the nature of the alleged Sub-Groups' interaction with the NEPDG, or the proximity of the NEPDG and alleged Sub-Groups to the President. The government further argues that it would violate the Constitution for this Court to even inquire into these matters.

The doctrine of constitutional avoidance counsels against answering such an important constitutional question at the motion to dismiss stage. By declining to resolve the constitutional issue at this stage of the case, this Court does not intend to suggest any doubt about the seriousness of the constitutional challenge raised by defendants to the application of FACA and the APA here. Rather, it is out of concern for the seriousness of this issue that this Court has determined that proceeding to discovery is appropriate.

It is a fundamental principle of constitutional interpretation that a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it. *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243, 49 L.Ed. 482 (1905) ("It is not the habit of the court to decide

questions of a constitutional nature unless absolutely necessary to a decision of the case."). The Supreme Court has consistently explained: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L.Ed. 101 (1944). Furthermore, it is equally fundamental that a court should not pass on a constitutional question prematurely. "It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied. . . .'" *Clinton v. Jones*, 520 U.S. 681, 690 n.11, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) (*quoting Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461, 65 S. Ct. 1384, 89 L.Ed. 1725 (1945)).

Here, the federal defendants ask this Court to resolve a constitutional question prematurely and, in so doing, fashion a constitutional ruling broader than the precise facts underlying this case. Defendants ask this Court to hold unconstitutional the application of FACA to any facts and factual inferences permissible from the face of plaintiffs' complaints. While it may be the case that plaintiffs will be able to prove all the pled facts as true, something defendants seriously contest, it is also likely that discovery will reveal facts that narrow the issues before this Court considerably. The proof of any violation of the statutes at issue here, FACA, the APA,

and the federal mandamus statute, is contingent on development of a factual record. It is entirely possible that defendants will prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committees at issue, or that plaintiffs have failed to identify final agency action, thus rendering defendants' constitutional concerns inapplicable. Furthermore, development of the factual record will better enable this Court, if ultimately faced with deciding whether it violates separation of powers to apply the APA, FACA, or the federal mandamus statute in this context, with the information necessary to properly apply the constitutional balancing test in the nuanced, fact-intensive fashion required by precedent. *E.g., Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (*Nixon II*); *Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

Defendants' justification for this Court determining the constitutional issue at this stage of the case is two-fold: first, they argue that no factual development is required to determine the constitutional issue, and second, that any factual discovery would raise identical constitutional concerns. Defendants' first argument flies in the face of the precedent that has developed separation of powers doctrine as a fact-intensive, case-by-case analysis of the specific nature of the intrusion into the President's performance of his constitutional duties. *Morrison*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569; *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777. Defendants' second argument is conclusory in nature, unsupported by precedent, and equally unpersuasive.

1. *Constitutional Balancing Test Deserves Further Factual Development*

Before explaining precisely why further factual development is necessary to effectively resolve the constitutional question here, first the Court must briefly discuss the proper legal standard to apply to separation of powers conflicts. Defendants have repeatedly invoked an incorrect constitutional standard in this case, a standard that would increase Executive power at the expense of the other branches of government. Defendants have made these arguments despite previous concessions of defense counsel that their preferred standard did not reflect the governing law. The government's oscillations before this Court reflect what appears to be a problematic and unprecedented assertion, even in the face of contrary precedent, of Executive power. To borrow the words of the D.C. Circuit in *Nixon v. Sirica*, "[s]upport for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers." 487 F.2d 700, 715 (D.C. Cir. 1973).

a. *Constitutional Standard*

The Supreme Court has affirmed time and again the importance of the allocation of governmental power by the United States Constitution into three coordinate branches. *Clinton v. Jones*, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed.2d 945 (1997); *Morrison*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569; *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); *Humphrey's Executor*, 295 U.S. 602, 55 S. Ct. 869, 79 L.Ed. 1611 (1935). This separation of powers was regarded by the Framers of the Constitution as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the

other." *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *see also Mistretta v. United States*, 488 U.S. 361, 383, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) ("[c]oncern of encroachment or aggrandizement . . . has animated our separation of powers jurisprudence."). Thus, the Supreme Court has invalidated actions by one branch of government that impermissibly usurp the power of another co-equal branch. *See, e.g., Plaut v. Spendthrift Farm*, 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (unconstitutional legislative assumption of judicial power); *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (unconstitutional legislative assumption of executive power); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952) (unconstitutional executive assumption of legislative power). Even when a branch of government does not assume for itself a power allocated to another, "the separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996); *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 856-57, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986); *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777.

If one thing is clear from these separation of powers cases, it is that the lines that divide the powers of the three branches of government are neither absolute nor "neatly drawn." *Clinton v. Jones*, 520 U.S. at 701, 117 S. Ct. 1636. "In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *United States v. Nixon*,

418 U.S. 683, 707, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (*Nixon I*). Conflicts and overlap are necessary byproducts of the constitutional design of checks and balances among the three branches of government.

The potential application of FACA to the NEPDG may well require this Court to determine the proper boundaries between the respective spheres of the co-equal branches of government. Indeed, the Supreme Court has recognized that applying FACA to meetings among Presidential advisors "present[s] formidable constitutional difficulties." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989); *see also Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C.Cir.1993)(*AAPS*). To be clear, defendants do not argue that the application of FACA would result in the aggrandizement of the Congressional or judicial role by usurping the powers of the Executive. Rather, the defendants contend that the application of FACA to the NEPDG encroaches on the sphere of the Executive by infringing the President's right to receive the confidential advice necessary to discharge his unique duties. In such a case, the proper test for determining whether Article II of the Constitution has been violated was first articulated by the Supreme Court in *Nixon II:*

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. [citing *Nixon I*]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote

objectives within the constitutional authority of Congress.

433 U.S. at 443, 97 S. Ct. 2777; *see also Morrison*, 487 U.S. at 695, 108 S. Ct. 2597 (1988); *AAPS*, 997 F.2d at 910. Thus, this Court would first examine whether FACA, as applied to the facts of this case, prevents the Executive Branch from accomplishing any constitutionally assigned functions. *Morrison*, 487 U.S. at 696, 108 S. Ct. 2597 (holding that the act creating the independent counsel's office did not infringe on the President's ability to "perform his constitutionally assigned duties"); *see also Clinton v. Jones*, 520 U.S. at 705-06, 117 S. Ct. 1636 (holding that civil lawsuit against sitting President did not constitute an impermissible intrusion by judiciary into ability of President to fulfill duties). If that question is answered affirmatively, this Court would then address whether that infringement is justified by the purposes of the congressional action. *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777; *AAPS*, 997 F.2d at 910.

The inconsistency in defendants' position with respect to the proper test to be applied to determine the constitutionality of an interference with Executive authority is troubling. The development of the government's constitutional arguments in this case is worth recounting. In the initial motion to dismiss the original Judicial Watch complaint, the government urged this Court to adopt a constitutional standard that has never gained the endorsement of a majority of the Supreme Court, and has recently been expressly rejected by the D.C. Circuit. Defendant argued that "[t]he Supreme Court has made clear that where, as here, the power the President is exercising is a power granted explicitly to him by the Constitution, Congress cannot interfere

with that power and any statute that purports to do so is unconstitutional." Defs.' Mot. of 10/17/02 at 14. Relying on the concurrence in *Public Citizen* rather than the majority in *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777, or *Morrison*, 487 U.S. at 696, 108 S. Ct. 2597, the government argued that where "a power has been committed to a particular Branch of Government in the text of the Constitution, the balance has already been struck by the Constitution itself." *Public Citizen*, 491 U.S. at 486, 109 S. Ct. 2558.

While conceding that the *Nixon/Morrison* balancing test applies, *See* Tr. 2/12/2002 at 33:17 - 34:1; 35:8 - 35:23; 36:15 - 38:7; 38:20 - 39:1; 39:9 - 40:16, the government urges this court nonetheless to apply the bright-line rule embraced by the *Public Citizen* concurrence. The government argued in its motions to dismiss that

> [w]hile the Court has, in other circumstances, considered the degree of intrusion into the Executive's constitutionally protected interest in light of the Congress' interest in adopting the particular legislation at issue in determining whether that legislation is valid, see *Morrison*, 487 U.S. at 695, 108 S. Ct. 2597, that approach is unnecessary where, as here, the legislation impedes the President's ability to carry out his *express* constitutional authority. Public Citizen, 491 U.S. at 484-86, 109 S. Ct. 2558 (Kennedy, J., concurring).

Defs.' Mot. of 3/8/02 at 24 (emphasis in original). Defendants have cited *no authority* other than the *Public Citizen* concurrence that explicitly holds that any infringement of a textually-authorized constitutional

duty is a *per se* violation of separation of powers, nor could they.[11]

The Executive Branch has long argued for a more formalistic understanding of the separation of powers doctrine than the Supreme Court and other courts have been willing to accept. *See Nixon I*, 418 U.S. at 706-707, 94 S. Ct. 3090; *Nixon II*, 433 U.S. at 441-44, 97 S. Ct. 2777; *AAPS*, 997 F.2d at 906 ("According to the government, [the Recommendation Clause] gives the President the sole discretion to decide what measures to propose to Congress, and it leaves no room for congressional interfeence."). In *Nixon II*, the Court rejected the government's argument for "three airtight departments" of government as "archaic." 433 U.S. at 441-44, 97 S. Ct. 2777. The Court has instead consistently embraced the view articulated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer:*

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

[11] To be fair, with respect to the constitutional standard, the government did brief both its preferred bright-line rule derived from the *Public Citizen* concurrence, and the application of the *Nixon/Morrison* balancing test. However, the government's brief says nothing about the fact that government's counsel conceded at oral argument to this Court that the *Public Citizen* concurrence standard is not the controlling law. Furthermore, while the government's briefs argue these two standards in the alternative, they say nothing about which alternative this Court *should* apply. If anything, the government's briefs imply that this Court should apply the *Public Citizen* test. *See* Defs.' Reply of 4/26/02 at 15 ("even assuming that *AAPS* mandates the balancing approach rather than the *Public Citizen* standard (a point Plaintiffs assert and Defendants contest) . . .").

343 U.S. at 635, 72 S. Ct. 863 (Jackson, J., concurring). In *Mistretta v. United States*, the Court explained, "The Constitution imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" 488 U.S. 361, 381, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Indeed, separation of powers principles do not mean that the branches of government "ought to have no partial agency in, or no control over the acts of each other." James Madison, The Federalist No. 47.

With this conception of the separation of powers doctrine in mind, the Supreme Court has never agreed with the position taken by the government here, that any infringement on any enumerated power in Article II is necessarily a *per se* violation of the Constitution. In *Morrison*, Justice Scalia's argument that the "executive power" described in Article II of the Constitution "does not mean *some of* the executive power, but *all of* the executive power" gained the support of no other Justice. 487 U.S. at 711, 108 S. Ct. 2597 (Scalia, J., dissenting). In his lone dissent, Justice Scalia argued for a "clear constitutional prescription that the executive power belongs to the President" and against the majority's "balancing test." *Id.* The majority of the Court opted to apply a balancing test to determine whether Congress had "impermissibly" intruded on the executive power. *Id.* at 696, 108 S. Ct. 2597. In *Public Citizen*, three other Justices argued for a bright-line rule similar to that advocated by Justice Scalia in *Morrison*. *Public Citizen*, 491 U.S. at 484-86, 109 S. Ct.

2558 (Kennedy, J., concurring).[12] Once again, that view did not persuade a majority of the Justices, who invoked the doctrine of constitutional avoidance to interpret FACA so as to avoid a constitutional challenge. *Id.* at 466, 109 S. Ct. 2558. Furthermore, in *AAPS*, the D.C. Circuit conducted a lengthy discussion of the flaws in the government's bright-line rule argument, offered by the government in that case as well.[13] 997 F.2d at 906-11.

The implications of the bright-line rule advocated by the government are stunning. Even if this Court were to consider the question of what separation of powers standard to apply without the benefit of precedent, it would reach the conclusion that the government's position is untenable. Any action by Congress or the Judiciary that intrudes on the president's ability to recommend legislation to Congress or get advice from Cabinet members *in any way* would necessarily violate the Constitution. The Freedom of Information Act and

---

[12] Justice Scalia recused from the *Public Citizen* case.

[13] While the D.C. Circuit's discussion of the constitutional issue raised by the application of FACA to the Health Care Task Force was arguably dicta because the Court ultimately declined to decide the constitutional issue, the Court explained that it was necessary to determine the strength of the constitutional argument raised by the government prior to applying the doctrine of constitutional avoidance. 997 F.2d at 906 ("It is, of course, necessary before considering the maxim of statutory construction to determine whether the government's constitutional argument in this case is a powerful one. In other words, are we truly faced, as the Court thought it was in Public Citizen, with a grave question of constitutional law?"). The Court rejected the government's constitutional standard but noted that the constitutional *concerns raised* were serious. This Court agrees with and follows the reasoning of that court, *Nixon II* and *Morrison*.

other open government laws would therefore constitute an unconstitutional interference with Executive authority. Any action by a court or Congress that infringes on any other Article II power of the President, for example, the President's role as Commander in Chief of the armed forces and the national security concerns that derive from that role, would violate the Constitution. Any congressional or judicial ruling that infringes on the President's role in foreign affairs, would violate the Constitution. Clearly, this is not the law. Such a ruling would eviscerate the understanding of checks and balances between the three branches of government on which our constitutional order depends.

Finally, this is not the first case before this Judge in which the government has advocated the theory of separation of powers rejected here.[14] While the government, like any other party, is free to argue for an extension of the law, it should be forthcoming when calling for such an extension. The fact that the government may want to advocate a new theory of Executive authority and the separation of powers is its prerogative. It cannot, however, cloak what is tantamount to an aggrandizement of Executive power with the legitimacy of precedent where none exists.

---

[14] In this case, and in at least one other before this Court, *Stillman v. Doe*, Civ. Action No. 01-1342 (EGS) (D.D.C.), the government has proceeded by mischaracterizing the existing standard and invoking the concurring opinion of three Justices of the Supreme Court in *Public Citizen* as controlling authority. The fact that the government has stubbornly refused to acknowledge the existing controlling law in at least two cases, does not strike this Court as a coincidence. One or two isolated mis-citations or misleading interpretations of precedent are forgivable mistakes of busy counsel, but a consistent pattern of misconstruing precedent presents a much more serious concern.

b. *Application of Constitutional Standard Requires Further Facts*

Thus, it is clear that once the question of whether applying FACA to the NEPDG violates Article II is properly before this Court, the constitutional inquiry will require balancing the following two considerations: first, this Court must inquire into whether the law's requirements would infringe the President's ability to perform constitutional functions, and second, the Court must determine whether that impairment is outweighed by any constitutionally authorized Congressional purposes. *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777; *Morrison*, 487 U.S. at 696, 108 S. Ct. 2597. It is critical to the application of this test that the Court determine the precise nature of the intrusion into Executive authority. The greater the intrusion into the Executive sphere, the greater the interest necessary to justify the intrusion.

The constitutional authority at stake here is the President's ability to receive advice that has been generated in confidence. While no clause of Article II expressly grants the President the power to acquire information or receive advice in confidence, the necessity of receiving confidential advice appears to flow from Article II. Several clauses of Article II reflect an understanding that the President will have access to information and the power to acquire it,[15] and the

[15] For example, Article II, Section 2, grants the President the power to "require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices." In addition, the State of the Union clause, requiring the President "from time to time give to the Congress Information of the State of the Union" presupposes superior or at least different access to information than the

Supreme Court has repeatedly recognized that the importance to the Presidency of receiving candid, honest, and when necessary, unpopular, advice from "high Government officials and those who advise and assist them in the performance of their manifold duties" is paramount. *Nixon I*, 418 U.S. at 705, 94 S. Ct. 3090. Indeed, the words of the *Nixon I* Court bear repeating:

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.

Id. That Court went on to explain:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens, and added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to

legislative branch. Art. II, Sec. 3. The Recommendations Clause, invoked by the government in this case, which empowers the President to "recommend to [Congress] such Measures as he shall judge necessary and expedient," similarly presupposes the ability to collect information and advice necessary to make such recommendations. Art. II, sec. 2. And as the Constitution did not presume the President to operate in a vacuum, the other powers listed in Article II, generally presuppose the President's ability to receive advice in order to exercise those powers in an informed manner.

> explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id. at 708, 94 S. Ct. 3090; *see also In re Sealed Case*, 121 F.3d 729, 736-40 (D.C. Cir. 1997) (discussing the history of the protection of executive communications and the executive privilege doctrine). As the D.C. Circuit explained in *AAPS*, "The Framers thus understood that secrecy was related to the executive's ability to decide and to act quickly—a quality lacking in the government established by the Articles of Confederation. If a President cannot deliberate in confidence, it is hard to imagine how he can decide and act quickly." 997 F.2d at 909.

Thus, although there is no specific privilege for protecting the confidentiality of Presidential communications or deliberations in the text of the Constitution, "[c]ertain powers and privileges flow from the nature of the enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *Id.* (*citing McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)). Equally clear, however, is that the need to maintain the confidentiality of the President's communications and deliberations is not unqualified. "The President's need for complete candor and objectivity from advisors calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values occurs." *Nixon I*, 418 U.S. at 706, 94 S. Ct. 3090.

The question raised by the application of FACA to the NEPDG and the alleged Sub-Groups is not whether

the President's constitutionally protected ability to receive advice in confidence is undermined, but whether his advisors' ability to deliberate in confidence is constitutionally protected, and how far down the line that protection extends. *Cf. In re Sealed Case*, 121 F.3d at 746 ("Does [executive] privilege only extend to direct communications with the President, or does it extend further to include communications that involve his chief advisers? And if the privilege does extend past the President, how far down into his circle of advisers does it extend?"). It is unclear from the facts pled in plaintiffs' complaints whether they allege that any of the deliberations involved communications with the President himself. Indeed, the only advice alleged to have directly been given to the President by the NEPDG, the final energy policy report, is a public document. *See* www.whitehouse.gov/energy/National-Energy-Policy.pdf.

While the Supreme Court has not reached the issue, the D.C. Circuit has held that the constitutional protection for executive communications extends beyond those communications that occur directly with the President. *See In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). The D.C. Circuit's warning about extending that constitutional protection too far applies here as well:

> Extending presidential privilege to the communications of presidential advisers not directly involving the President inevitably creates the risk that a broad array of materials in many areas of the executive branch will become "sequester[ed]" from public view. *Wolfe*, 815 F.2d at 1533. President Nixon's attempt to invoke presidential privilege to prevent release of evidence indicating that high level execu-

tive officers engaged in illegal acts is perhaps the starkest example of potential for abuse of the privilege. And openness in government has always been thought crucial to ensuring that the people remain in control of their government . . . The very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance.

Id. at 749. Indeed, according to James Madison,

> [a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt, ed. 1910). The D.C. Circuit in *In re Sealed Case* did specifically limit its analysis to the context before it:

> Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential adviser is sought for use in a judicial proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.

121 F.3d at 753 (D.C. Cir. 1997). However, despite the limitation on its holding, *In re Sealed Case* makes clear that determining how far down the line of advisors constitutional protection should extend in the context of balancing the needs of the Executive and Congress will be a fact-intensive inquiry.

Determining who participated in the deliberations of the NEPDG and the alleged Sub-Groups, whether in fact those Sub-Groups existed, and who interacted with the private individuals involved, the role played by private individuals, and the number of meetings and interactions will affect this Court's determination of the impact that revealing such activities to the public would have on the President's ability to perform his Executive functions. Furthermore, the role of the Vice President in the NEPDG is to be determined. The fact that the Vice President was tasked with leading the NEPDG does not mean that in fact he participated in all aspect of the NEPDG or the meetings of the alleged Task Force Sub-Groups. These Sub-Groups could have been much less operationally proximate to the President, and revealing their activities would arguably infringe the President's Executive authority to a much lesser degree.

Furthermore, no case has directly decided whether revealing the identity or nature of advice given by private individuals to the President or the President's advisors would "impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691, 108 S. Ct. 2597. However, two cases have looked at the role of private individuals in advising the President and have suggested that constitutional protection would extend to such advice. *See Public Citizen*, 491 U.S. at 466, 109 S. Ct. 2558; *AAPS*, 997 F.2d at 910. In

Public Citizen the Supreme Court recognized the "formidable constitutional difficulties" that would be raised by applying FACA to the Justice Department's consultations with the committee of the American Bar Association that evaluates the qualifications of federal judicial nominees. 491 U.S. at 466, 109 S. Ct. 2558. In discussing the constitutional issue raised by the application of FACA to President Clinton's Heath Care Task Force, the D.C. Circuit stated: "A statute interfering with a President's ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials, therefore raises Article II concerns." *AAPS*, 997 F.2d at 910. After noting the constitutional concern, both courts declined to resolve the question of whether applying FACA to a group that includes governmental and private advisors prevents the President from accomplishing his constitutionally assigned functions. Thus, the question of whether granting public access to the deliberations of high level officials of government, presidential advisors, and private individuals intrudes upon the ability of the President to conduct his official duties is unresolved. The extent of the constitutional protection for those deliberations will turn in large part on the proximity of those advisors to the President. The fact that the group was established to deliver a final report to the President is not determinative.

Additionally, this Court would be careful when applying the *Morrison* balancing test to look at those specific requirements of FACA that would have applied to the NEPDG and its alleged Sub-Groups, and determine whether applying those requirements would have infringed on the President's ability to do his job. The question here is not only whether releasing the names

of the participants, or the documents generated by the group would so infringe, but rather would applying all of the FACA requirements to the NEPDG run afoul of the separation of powers. Amicus correctly points out that the imposition of the FACA requirements is less onerous than portrayed by the government. FACA has two very important exceptions to the requirement that the public have access to meetings and documents. Pursuant to various FOIA exemptions, which include deliberative process and national security concerns, documents may be withheld from the public. 5 U.S.C. App. 2 § 10(b). Furthermore, pursuant to the exceptions listed in 5 U.S.C. § 552b, the President or an agency head can close advisory committee meetings to the public. These exceptions should be considered when determining the actual impact that FACA would have on the confidentiality of advice to the President.

All of these questions are better addressed only after discovery into the activities and composition of the NEPDG and the alleged Sub-Groups. Contrary to defendants' argument, it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum that established the NEPDG.

2. *Discovery in this Case Will Raise Fewer and Different Constitutional Concerns*

Defendants' second argument against proceeding to discovery, that discovery raises identical constitutional issues as does this motion to dismiss, is both conclusory and belied by precedent. Defendants, in a footnote, state in a conclusory manner "that these constitutional arguments apply to prevent discovery in this case." Defs.' Mot. of 4/5/02 at 19 n.17. Further, in response to

an Order from this Court requiring defendants to identify with precision the constitutional concerns raised by discovery into particular factual issues, *see* Order of 1/31/02, defendants simply reasserted the troubling statutory and constitutional arguments that had prompted this Court's Order in the first place. Defs.' Mem. of 2/5/2002 at 1 ("it is unnecessary for the Court to address the constitutional issues [raised by discovery] for five compelling reasons"). Thus, while defendants have consistently asserted that discovery would implicate constitutional concerns, they have also consistently failed to explain or provide legal support for those conclusions.

Contrary to defendants' arguments, discovery in this case will potentially raise related, but different, constitutional questions than does the application of FACA to the NEPDG. In particular, the constitutional question raised by the application of a statute to Executive action, reflects a conflict between the Executive and Congressional branches of government, and must be balanced as such. Any potential intrusion into the President's constitutional authority that occurs because of specific requests for documents or information during the course of discovery must be analyzed as a conflict between the needs of the Executive and Judicial branches, and will involve the application of different precedent. *See, e.g., In re Sealed Case*, 121 F.3d at 753. Furthermore, the breadth and scope of the constitutional issue raised by applying the requirements of FACA to advisory committees established by the President dwarfs the particular, specific questions that will be raised by a very tightly-reigned discovery process. Whether revealing a particular document or piece of information will impermissibly interfere with

the President's constitutional authority is a much more narrow inquiry than whether the application of all the FACA procedural requirements to the deliberative process of Presidential advisors will violate the Constitution. Rather than address this broad constitutional question in a factual vacuum, this Court will address the particular questions generated by discovery requests.

In conclusion, there are three primary reasons why postponing consideration of defendants' constitutional challenge is warranted here. First, after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA. Second, even if this Court were to attempt to apply the *Nixon/Morrison* balancing test, further factual development is necessary to clearly determine the extent to which applying FACA to the NEPDG and its alleged Sub-Groups will intrude on the President's constitutional authority. Third, while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here. All of these reasons weigh heavily in favor of considering any applicable constitutional questions after a factual record has been more fully developed, and requiring the government to raise specific constitutional objections to the discovery process as it proceeds.

F. Judicial Watch's FOIA Claim

Judicial Watch has also sued the Vice President pursuant to FOIA. On June 25, 2001, Judicial Watch wrote to the Vice President and requested certain records related to the NEPDG pursuant to FOIA. *See* Jud.

Watch Sec. Amend. Compl., Ex. 8. On July 5, 2001, the Counsel to the Vice President responded on behalf of the Vice President, declining the request on the grounds that FOIA does not provide for disclosure of the requested material. *See* Jud.Watch Sec. Amend. Compl., Ex. 9.

FOIA is only applicable to "agencies" and "agency records." *See generally* 5 U.S.C. § 552. Entities within the Executive Office of the President whose "sole function is to advise and assist the President" are not agencies for purposes of FOIA. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155-56, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980); *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993). Defendants persuasively argue that the Vice President and his staff are not "agencies" for purposes of FOIA. *See Meyer v. Bush*, 981 F.2d at 1294 (expressing doubt as to whether FOIA applies to Vice President); *cf. Armstrong v. Bush*, 924 F.2d 282, 286 n. 2 (D.C. Cir. 1991) (President and Vice President subject only to Presidential Records Act, not Federal Records Act).[16] The FOIA claim against the Vice President is therefore dismissed.

Both Judicial Watch and the federal defendants assume that Judicial Watch's Second Amended Complaint also states a FOIA claim against the NEPDG. *See* Defs.' Mot. to Dismiss of 3/8/02 at 15; Jud. Watch Opp'n of 3/21/02 at 14-15 (arguing that further discovery is necessary before determining whether the NEPDG is an "agency" for FOIA purposes). However, Count II of the Complaint does not state that plaintiff filed a FOIA

[16] Like the D.C. Circuit in *Meyer*, 981 F.2d at 1294 n.7, this Court does not decide whether the Vice President could ever act as the head of a agency subject to FOIA.

request to the NEPDG, but rather that plaintiff sent a request letter to Vice President Cheney and that counsel on behalf of Vice President Cheney responded. The request letter in question, attached as Exhibit 8 to Judicial Watch's Second Amended Complaint, confirms that the request for records was indeed made only to the Vice President. For this reason, there is no need for this Court to address whether the NEPDG is an "agency" for purposes of FOIA. Judicial Watch has stated a FOIA claim only against the Vice President, and that claim is dismissed.

III. Private Defendants' Motions to Dismiss

In addition to suing the Vice President, the NEPDG, and other federal officials, Judicial Watch has sued several private individuals, including Mark Racicot, Haley Barbour, Kenneth Lay, Thomas Kuhn, and John and Jane Does 1-99. These individuals are named as defendants only with respect to Count I of Judicial Watch's Second Amended Complaint, which alleges violations of FACA.[17] For the reasons discussed above, FACA provides no private cause of action and therefore these claims are dismissed.

CONCLUSION

For the foregoing reasons, the federal defendants' motions to dismiss are granted in part and denied in part and the private defendants' motions to dismiss are granted. An appropriate Order accompanies this Memorandum Opinion.

[17]. The private individuals were initially named as defendants in Count III as well, but that claim against these defendants was dismissed on May 31, 2002. *See* Order of 5/31/02. Only federal defendants are named in Counts II and IV.

IT IS SO ORDERED.

ORDER

For the reasons stated in the accompanying Memorandum Opinion issued this same day, it is hereby

ORDERED that this Order shall supercede the Order issued by this Court on May 23, 2002; it is

FURTHER ORDERED that the federal defendants' motions to dismiss plaintiff Judicial Watch's Second Amended Complaint and plaintiff the Sierra Club's Complaint are **GRANTED IN PART AND DENIED IN PART**; it is

FURTHER ORDERED that the motions to dismiss filed by Mark Racicot, Haley Barbour, and Thomas Kuhn are **GRANTED**; it is

FURTHER ORDERED that Count I of Judicial Watch's Second Amended Complaint is **DISMISSED** with respect to all defendants; it is

FURTHER ORDERED that Count II of Judicial Watch's Second Amended Complaint is **DISMISSED** with respect to all defendants; it is

FURTHER ORDERED that plaintiffs' APA claims with respect to Vice President Richard Cheney and the National Energy Policy Development Group (NEPDG) are **DISMISSED**; it is

FURTHER ORDERED that the federal defendants' motion to dismiss Counts III and IV of Judicial Watch's Second Amended Complaint is **DENIED** with respect to the remaining defendants; it is

FURTHER ORDERED that the federal defendants' motion to dismiss the Sierra Club's First and Second

Claims for Relief is **DENIED** with respect to the remaining defendants; it is

FURTHER ORDERED that plaintiffs shall jointly submit a proposed discovery plan by no later than 5 p.m. on Friday, July 19, 2002; it is

FURTHER ORDERED that defendants shall file any objections to the proposed discovery plan by no later than 5 p.m. on Friday, July 26, 2002; it is

FURTHER ORDERED that plaintiffs shall file a joint reply by no later than 5 p.m. on Tuesday, July 30, 2002; it is

FURTHER ORDERED that a status hearing shall be held on Friday, August 2, 2002 at 9 a.m. in Courtroom One to discuss the proposed discovery plan and any objections thereto and to determine whether further briefing is necessary with respect to any claims of privilege asserted by the government.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUBMIA

September Term, 2003
No. 00-5354
Consolidated with 02-5355, 02-5356

IN RE RICHARD B CHENEY, VICE PRESIDENT OF THE UNITED STATES ET AL., PETITIONERS

Filed: Sept. 10, 2003

ORDER

Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE,* HENDERSON,** RANDOLPH,* ROGERS, TATEL, GARLAND, ROBERTS,* Circuit Judges

Petitioners' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

* Circuit Judges Sentelle, Randolph, and Roberts would grant the petition for rehearing en banc.

** Circuit Judge Henderson did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ MICHAEL C. MCGRAIL
MICHAEL C. MCGRAIL
Deputy Clerk

APPENDIX F

The pertinent provision of the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (5 U.S.C. App. 1) are as follows:

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed:

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§ 3. Definitions

For the purpose of this Act—

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

* * * * *

§ 6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abol-

ished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

§ 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

* * * * *

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory

committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

Supreme Court, U.S.
FILED
OCT 30 2003
OFFICE OF THE CLERK

No. 03-475

In the Supreme Court of the United States

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SIERRA CLUB

ALAN B. MORRISON
(COUNSEL OF RECORD)
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington D.C. 20009
(202) 588 7720

DAVID BOOKBINDER
SIERRA CLUB
ENVIRONMENTAL
LAW PROGRAM
408 C Street, NE
Washington, D.C. 20002
(202) 548-4598

ALEX LEVINSON
SANJAY NARAYAN
SIERRA CLUB
ENVIRONMENTAL
LAW PROGRAM
85 Second Street
San Francisco, CA 94104
(415) 977-5769

QUESTIONS PRESENTED

Because this Court is obligated to consider jurisdictional questions first, and because respondents believe that the questions presented by petitioners do not properly state the issues before this Court, respondents have re-ordered and re-stated the questions presented as follows:

1. Did the court of appeals correctly conclude that it lacked appellate jurisdiction over the purported appeal under 28 USC §1291 and the petition for mandamus filed under 28 U.S.C. § 1651, where (1) petitioners made no claim of absolute or qualified immunity from suit, (2) petitioners raised no claim of executive privilege or any specific objections to any discovery request, and (3) petitioners sought interlocutory review of the order of the district court refusing to dismiss the cases and directing that limited discovery be permitted to resolve the factual questions that underlie respondents' legal claims?

2. Did the district court correctly refuse to dismiss these Federal Advisory Committee Act cases brought under the Administrative Procedure Act and the mandamus statute prior to discovery where it concluded that the factual record put forth by petitioners was insufficient to decide the merits of the claims presented?

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner-defendant Vice President Richard B. Cheney, Judicial Watch, Inc., and Sierra Club were plaintiffs in the district court and appellees-respondents in the court of appeals. Sierra Club has no parent corporation, and no publicly held corporation owns 10% or more of Sierra Club.

Other parties who were defendants in the district court and petitioners-appellants in the court of appeals and this Court are the National Energy Policy Development Group, Joshua Bolton, Larry Lindsey, and Andrew Lundquist. The following persons are additional defendants in the district court, but were not appellants or petitioners in the court of appeals or this Court: Paul O'Neill, Gail Norton, Ann M. Veneman, Donald Evans, Norman Mineta, Spencer Abraham, Colin Powell, Joseph M. Allbaugh, Christine Todd Whitman, Patrick H. Wood, III, and Mitchell Daniels. The following persons were defendants in the district court, but were dismissed as defendants before any proceedings in the court of appeals: Mark Racicot, Haley Barbour, Kenneth Lay, and Thomas Kuhn.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

I. THERE WAS NO APPELLATE JURISDICTION IN THE COURT OF APPEALS AND HENCE NONE IN THIS COURT 9

The Court of Appeals Lacked Jurisdiction Under Section 1291 12

There Was no Mandamus Jurisdiction in the Court of Appeals 17

II. THE MERITS QUESTION PRESENTED DOES NOT WARRANT REVIEW 19

CONCLUSION 25

ADDENDUM 1a

TABLE OF AUTHORITIES

Association of American Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) 2, 3, 7

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 10, 23

Clinton v. Jones, 520 U.S. 681 (1997) 13

Helstoski v. Meanor, 442 U.S. 500 (1979) 18

In the Matter of the Eastern Cherokees, 220 U.S. 83 (1911) 18

Mitchell v. Forsyth, 472 U.S. 511 (1985) 12

Morrison v. Olson, 487 U.S. 654 (1988) 19

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 12

Nixon v. General Services Admin., 433 U.S. 425 (1977) 19

Public Citizen v. Department of Justice, 491 U.S. 440 (1989) 17, 20, 21

Swint v. Chambers County Comm'n, 514 U.S. 35 (1995) 8

United States v. Moats, 961 F.2d 1198 (5th Cir. 1992) 12

United States v. Nixon, 418 U.S. 683 (1974) 13, 14, 15, 17

Weir v. Propst, 915 F.2d 283 (7th Cir. 1990), *cert. denied*, 514 U.S. 1035 (1995) 12

STATUTES AND RULES

28 U.S.C. § 1291 ..... 7, 12

28 U.S.C. § 1292(b) 5, 6

28 U.S.C. § 1361 ..... 4, 10

28 U.S.C. § 1651 7

Federal Advisory Committee Act, 5 U.S.C. App. 1 ..... *Passim*

Rule 4(a), Federal Rules of Appellate Procedure 12, 18

Rule 12(b)(6), Federal Rules of Civil Procedure 3, 10, 22

Rule 25(d)(1), Federal Rules of Civil Procedure 21

Rule 37(b), Federal Rules of Civil Procedure.....15, 16

Rule 56, Federal Rules of Civil Procedure 22

OTHER AUTHORITIES

C. Wright, *et al.*, 15A Federal Practice & Procedure (1992).....12

STATEMENT OF THE CASE

The Statement in the petition accurately describes the basic events that occurred in the courts below. However, it omits a number of significant matters that demonstrate why there was no appellate jurisdiction in the court of appeals (and hence there is no jurisdiction in this Court), and why the issues that petitioners contend are presented on the merits are not the issues decided by the lower courts and hence are not properly before this Court.[1]

This petition involves two cases raising claims under the Federal Advisory Committee Act, 5 U.S.C. App. 1 ("FACA"). That law requires, *inter alia*, that committees established by the President or federal agencies to obtain advice must meet certain formal procedural requirements and must conduct their business in public, subject to certain exceptions. There is a specific exclusion in FACA for committees composed entirely of federal officers and employees, and it was this exception on which petitioners relied in claiming that the National Energy Policy Development Group ("NEPDG" or the "Task Force") was not subject to FACA.

---

[1] The petition does not contain a page listing the parties to these consolidated cases, and the caption lists only Vice President Richard B. Cheney as a petitioner. On page 1 the petition states that it is filed on behalf of the "former National Energy Policy Development Group (NEPDG) and former members and staff of the NEPDG." Thus, petitioners apparently concede that these cases may continue against the other defendants. Although the remaining defendants are technically respondents in this Court, this brief will use the term "respondents" to refer to plaintiffs Judicial Watch and Sierra Club.

There is no dispute that the order creating the Task Force and the list of members set forth in its final report named only federal officials. It is also undisputed that, when these complaints were filed, the law was clear in the District of Columbia Circuit that the formal membership of an advisory committee is not conclusive on the applicability of FACA's exemption for committees composed entirely of federal officials. *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"). Under *AAPS*, a plaintiff is entitled to discovery to determine whether, as a factual matter, non-federal officials participated as *de facto* members in the work of an advisory committee and/or any of the sub-groups that were created to help carry out its mission.

Prior to filing its lawsuit, respondent Judicial Watch wrote to the Office of the Vice President, citing news reports, and claiming that private persons from the energy industry had participated extensively in the work of the Task Force and therefore that the Task Force had operated in violation of FACA. The Counsel to the Vice President responded with a brief letter denying the factual allegations, but providing no specifics to support that position. Judicial Watch then filed suit in the United States District Court for the District of Columbia alleging that the Task Force had operated in violation of FACA, asking for a declaratory judgment to that effect, and seeking an order that the Task Force and the other defendants comply with FACA's requirements, including that the Task Force make its records public to the extent required by law.

Several months later, respondent Sierra Club filed a similar suit in the Northern District of California, which was transferred to the District of Columbia and consolidated with

the Judicial Watch case. The Sierra Club complaint specifically alleged that non-federal officials participated extensively in sub-groups that the Task Force had established to assist it in gathering information and making recommendations. Because the sub-groups were not mentioned in the letter from Judicial Watch, the letter from the Counsel to the Vice President did not mention sub-groups or deny that their participants included non-federal personnel.

All of the defendants moved to dismiss the complaints in their entirety under Rule 12(b)(6). They specifically argued that "fundamental separation of powers principles would bar application of FACA to the [Task Force] or the Vice President," and that any "discovery would raise the same constitutional issues as would application of FACA." Reply on Motion to Dismiss at 25. At no time in the district court did petitioners attack the continued validity of *AAPS*; instead they argued that *AAPS* supported the proposed discovery bar. Reply at 27. They did not invoke any special or heightened pleading rules or claim any constitutional immunity from suit. Their focus at the motion to dismiss stage was on arguing that any claim that plaintiffs might have must be decided solely on the basis of the President's Memorandum establishing the Task Force, without any discovery. Reply at 9-11. [2]

---

[2] The operative Judicial Watch complaint at the time that the motion to dismiss was denied was the second amended complaint, which had 11 attachments, totaling almost 50 pages, including two transcripts of interviews on the subject of the Task Force with the Vice President. Appendix in the Court of Appeals (C.A. App.) at 27-101. Thus, the assertion in petitioners' first question presented that the case was based on "unsupported allegations" is, at best, the opinion of petitioners as to the probity of those attachments.

After extensive briefing and oral argument, the court issued a careful and lengthy opinion, declining to dismiss the complaints. The district court squarely rejected the claim that discovery alone would violate separation of powers. Pet. App. 117a-119a. It agreed with the Government that FACA did not provide for an implied cause of action (*id.* at 77a) and that the Vice President was not an agency and hence could not be sued under the APA, although the Cabinet officers who were also defendants could be. *Id.* It also agreed that the private individuals named in Judicial Watch's complaint were not proper defendants in a FACA case. *Id.* at 121a. However, the court allowed the mandamus action to proceed against the Vice President, as well as against the other defendants, because the mandamus statute, 28 U.S.C. § 1361, is not limited to agency officials and because the presence of the Vice President was needed to assure that adequate discovery could be had and, if plaintiffs prevailed, meaningful relief could be obtained. *Id.* at 96a-97a.

The court also recognized that, in some situations, compliance with FACA for a committee chaired by the Vice President might violate principles of separation of powers. Because this was not a case where the plaintiffs' claims directly threatened the powers of the President (the advice had already been rendered and the only issue was whether the Task Force complied with FACA), the district court concluded that the separation of powers issues should be decided based on more facts than were currently before the court and that at least some discovery was needed on the threshold factual question of whether private persons had participated in the work of the Task Force or its sub-groups. In addition, the court noted, discovery might show no factual basis for the claims, in which case there would be no need to reach the separation of powers issues. *Id.* at 119a.

The district court did not simply turn the plaintiffs loose to embark on whatever discovery they chose, but stated that any discovery will be "very tightly-reined." *Id* at. 118a. Thus, in its July 11, 2002 order, the court directed plaintiffs to submit a discovery plan in eight days, gave defendants a week to reply, and set a hearing for August 2, 2002, to consider any objections defendants had to plaintiffs' proposed discovery. *Id.* at 123a. Instead of merely submitting a plan for discovery, which would then have to be fleshed out, plaintiffs also submitted a joint set of nine interrogatories and eight requests to produce documents, the operative portions of which are appended to this opposition. Add. 1a-6a. The discovery is mainly directed to gathering information on the threshold issue of whether private parties participated in the Task Force and its sub-groups, none of which would necessarily require production of deliberative materials of the kind normally exempt from public disclosure.

Petitioners' response was the same as before: no discovery was appropriate. They did not object to the plan or to specific interrogatories or requests to produce on the ground that they would require the production of confidential information of any kind, let alone did they assert any privilege claim – executive or otherwise – as to any of the discovery. Nor did they then file an appeal, seek a writ of mandamus in the court of appeals, or ask the district court for a certification under 28 U.S.C. § 1292(b): they simply maintained the same position that they had urged in their motion to dismiss.

Not surprisingly in the face of the same opposition that it had previously found wanting, the district court at the conclusion of the August 2nd hearing approved the discovery

plan and permitted plaintiffs to serve their proposed discovery. Then, a month later, when it came time to answer or object, petitioners moved for a protective order, applicable to plaintiffs' entire discovery. Again, the objection was across-the-board, and there was no claim of executive privilege or contention that any particular request was overbroad or otherwise improper. That motion also was denied, although the district court offered to review materials – or even a privilege log – in camera. C.A. App. 283-284.

Once again petitioners refused to respond or raise specific objections. This time, however, petitioners announced that they were going to the court of appeals, which they finally did on November 12, 2002, when they filed a notice of appeal and a petition for mandamus, both premised on the argument that the district court should have decided the case solely on the record that petitioners presented. They also asked for a stay of discovery, even though they had not answered or objected to a single item of discovery or even prepared a privilege log. The district court denied the stay motion, but extended the time to reply once again to allow petitioners to seek relief from the court of appeals, which granted an administrative stay on December 6, 2002. However, the district court continued to show deference to petitioners' contentions by declining to enter the sanctions orders requested by plaintiffs based on defendants' refusal to respond or object specifically for more than two months after responses were due. In addition to seeking mandamus and filing an appeal, petitioners also asked for certification under 28 U.S.C. § 1292(b), which the district court denied on November 27, 2002.

After hearing oral argument, the court of appeals dismissed the appeal and writ of mandamus for lack of

jurisdiction on July 8, 2003, almost a year after the district court had denied the motion to dismiss. Petitioners had asserted jurisdiction in the court of appeals under 28 U.S.C. § 1291, relying on the collateral order doctrine, and under mandamus, using the All Writs Act, 28 U.S.C. § 1651, claiming that the district court's orders permitting discovery fell within those exceptions to the final judgment rule. The court of appeals rejected petitioners' arguments, finding that no exception to the final judgment rule applied in these circumstances.

In particular, the court rejected the claims that, in the absence of immediate appellate review, petitioners would be faced with an intolerable choice of complying with discovery that they believed was improper – which would moot the controversy – or being held in contempt for failing to do so. The court of appeals correctly noted that, given the stage of discovery below, petitioners were faced with no such choice at this time, if they would ever be placed in such a position. Thus, the court of appeals properly concluded that the attempt to obtain review of the district court's ruling was premature and that it had no jurisdiction to entertain the appeal.

Judge Randolph, in dissent, sided with petitioners, albeit for a reason that they had never raised in the district court or in the court of appeals. He argued that the decision in *AAPS* was wrong and should be overturned, in which case the district court would be required to dismiss the complaint. He did not explain how the court of appeals could surmount the final judgment rule to achieve that result, let alone how this panel could overturn a decision of a prior panel. Nor did he dispute that, if *AAPS* were still good law, the district court

had acted properly in allowing the discovery that plaintiffs propounded.

Petitioners sought rehearing en banc, which was denied. They then asked for a stay pending review in this Court. Respondents did not oppose the stay, and they agreed not to seek to move discovery ahead provided that the petitioners filed in this Court by September 30, which they did. The panel majority denied the stay because it could find no substantial harm even from the reactivation of discovery in the district court and because a stay was unnecessary given respondents' representations that they would not proceed below until this Court acted. Order of September 30, 2003.

REASONS FOR DENYING THE WRIT

The petition asks this Court to decide a number of far-reaching constitutional and statutory questions. Whether those questions would someday warrant review by this Court is of little moment because the court of appeals correctly recognized that it lacked jurisdiction over them, and hence this Court is also without jurisdiction. *Swint v. Chambers County Comm'n,* 514 U.S. 35 (1995). To understand why the court of appeals lacked jurisdiction over these premature attempts to obtain appellate review, it is necessary to focus on the nature of the claims in this case and the alleged errors that petitioners contend warranted review below and in this Court.

However, before turning to the specific reasons why the petition should be denied, it is appropriate to place the filing of the petition in proper perspective. As a result of petitioners' efforts to avoid discovery in the district court by seeking review first in the court of appeals and now in this

Court, it will be at least sixteen months after petitioners' motion to dismiss the complaints was denied before they are required to respond or object to a single interrogatory or request for document production. In the meantime, the facts surrounding how the recommendations of the Task Force were prepared, and whether that was done in compliance with FACA, have remained secret, while the energy legislation for which the Task Force developed its recommendations is moving through Congress and may well be signed into law before discovery even begins. In short, petitioners have succeeded, through premature appeals and now a writ in this Court, in delaying the Task Force's day of reckoning. Those tactics should now come to an end, and the Court should deny the petition.

I. THERE WAS NO APPELLATE JURISDICTION IN THE COURT OF APPEALS AND HENCE NONE IN THIS COURT.

These two cases allege that the Task Force was operating as an advisory committee under the Federal Advisory Committee Act, but did not comply with that act. Respondents contend that, even if only federal officials were formally designated as members of the Task Force and its sub-groups, the exemption for advisory committees comprised only of federal officials would not be applicable because the Task Force and its sub-groups developed their recommendations with extensive participation by non-government personnel. It is undisputed that, under the law of the District of Columbia Circuit, if those factual claims were correct, the FACA exemption would be lost.

Petitioners moved to dismiss the complaints under Rule 12(b)(6), on a variety of theories. However, the one on

which petitioners focus their petition is the contention that the district court was required to decide the issues presented without allowing respondents any discovery. No case supports such a position, *AAPS* contradicts it, and this Court's decision in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), makes it clear that a reviewing court is not required to decide a case on the kind of inadequate record presented here.

After extensive briefing and oral argument, the district court entered an order on July 11, 2002, granting certain aspects of the motions to dismiss, but denying the remainder, thereby permitting these cases to go forward. The opinion accompanying that order made it perfectly clear that the district court was going to allow discovery on what it saw as the factual claims presented by these cases. In doing so, it rejected the Government's legal arguments that the Vice President was not a proper defendant in these suits, that the cases could not proceed under the APA or under the mandamus statute, 28 U.S.C. §1361, and that any discovery would necessarily violate separation of powers. To implement that opinion, the July 11 order directed plaintiffs to submit a discovery plan eight days later, gave defendants a week to reply, and set a status conference for August 2 to discuss the discovery plan and possible additional briefing on "any claims of privilege asserted by the government." Pet. App. 123a.

Thus, on July 11, three things were clear: any claims that defendants had that the district court should have dismissed the case at that stage had been finally rejected; discovery of defendants was inevitable, although the scope of that discovery was yet to be determined; and claims of privilege with respect to specific discovery requests would be

entertained as they arose. Nothing that happened in the district court after that date altered any of those propositions in any way. Although defendants opposed every effort that plaintiffs made to move discovery ahead, their objections were identical to the ones that they had previously raised – no discovery was proper and the burden of even having to respond with specific claims of privilege would violate principles of separation of powers. There was never a claim that any particular item of discovery was particularly invasive, but only that no discovery at all was proper. That is, in essence, the first question in the petition, which objects to any form of discovery in this case. To be sure, the district court issued subsequent orders in connection with the discovery proceedings, but the basis of the Government's claims never changed – no discovery is permitted in this case. And the answers of plaintiffs and the district court also remained unchanged – discovery is needed to resolve the legal issues.

The proper characterization of the question presented is essential for several reasons. First, it takes this case out of the group of cases on which petitioners rely in which review was sought to prevent a lower court from violating specific privileges for specific documents. Second, it demonstrates that petitioners' basic objection – that any discovery would violate separation of powers – was rejected in the July 11th order and that nothing changed after that. Third, their claim is, at bottom, one that the complaints should have been dismissed, either on the merits under FACA, or because the Vice President (and perhaps the other petitioners) have a constitutional right not to submit to any discovery in cases of this kind, presumably on some kind of immunity theory.

The Court of Appeals Lacked Jurisdiction Under Section 1291.

Given the theories on the merits on which petitioners rely in this Court, the operative order was the order of July 11, 2002, denying the motion to dismiss and directing that discovery proceed. No matter how these defenses (or claims) are characterized, their substance is that these cases should not have been permitted to proceed any further, and that the district court erred on July 11, 2002, in not dismissing them. Therefore, even if the collateral order doctrine applies (which as we explain below it does not), petitioners' appeal was too late. The time for such an appeal under FRAP Rule 4(a)(1)(B) was sixty days, which expired on September 9, 2002. No notice of appeal was filed until November 12, 2002, more than 120 days after July 11. The fact that the appeal here was based on the collateral order doctrine does not render the 60-day time limit inapplicable. Rule 4(a) applies whenever there is an appeal under section 1291, including an appeal of a collateral order, which is simply one kind of final order under section 1291. *See e.g., Weir v. Propst,* 915 F.2d 283, 286 (7th Cir. 1990), *cert. denied,* 514 U.S. 1035 (1995); *United States v. Moats,* 961 F.2d 1198, 1203 (5th Cir. 1992); C. Wright, A. Miller, & E. Cooper, 15A Federal Practice & Procedure § 3911 at 357 (1992).

Nor is this a proper case for the collateral order doctrine, even if the appeal had been timely. First, the nature of the relief sought is immunity from discovery, which in this context means total immunity since it is impossible to challenge petitioners' factual claims without discovery. Yet it is noteworthy that the petition does not cite any absolute or qualified immunity cases, such as *Mitchell v. Forsyth,* 472 U.S. 511 (1985), or *Nixon v. Fitzgerald,* 457 U.S. 731 (1982),

which provide the kind of relief that petitioners seek – dismissal of the entire case, and which provide for an immediate appeal if such a defense is rejected. Indeed, they dare not request that kind of constitutional immunity because it is so obviously inapplicable to the statutory claims in this case, in which the district court simply denied a motion to dismiss.

Second, there is no basis for any blanket claim of vice-presidential immunity from discovery in federal court. That is the teaching of *Clinton v. Jones*, 520 U.S. 681 (1997), another case missing from the petition, where this Court rejected claims by a sitting President, in a case based on a claim unrelated to his official duties, that he was immune from all civil discovery. Surely, if there is no blanket bar to discovery in that situation, the Vice President and subordinate White House officials have no greater immunity claim here, especially when the lawsuit relates to their official actions while in office and the primary relief sought is a declaratory judgment. Furthermore, none of the collateral order cases permits an appeal when, as here, the claim is solely one of immunity from all discovery.

In this Court, as below, petitioners place principal reliance on *United States v. Nixon,* 418 U.S. 683 (1974), to support appellate jurisdiction. But that reliance is misplaced, as the court of appeals properly concluded. There are four principal distinctions between *Nixon* and this case that explain why even a timely appeal from the July 11th order (or from any of the orders entered thereafter) would not fall within the *Nixon* rationale. First, the party opposing discovery in *Nixon* had already raised a procedurally proper claim of executive privilege as to the specific tapes being sought, and that claim had been definitively rejected by the

district court. Here, no claim of privilege for any document or for any answer to any question has been raised, let alone rejected. Second, the person seeking review in *Nixon* was not a party to the underlying proceeding before the grand jury, and therefore there would be no other "final judgment" against him from which he could take an appeal, as ordinary litigants can in civil cases like this in which the persons subject to discovery are parties to the proceedings.

Third, the only other step that arguably could have been required in *Nixon* before an appeal would have been proper was to hold the President in contempt, but in this case the district court is at least several steps away from any possible contempt ruling. Thus, petitioners may choose to answer questions and produce unprivileged documents that may satisfy plaintiffs, or the district court may conclude that such production constitutes sufficient compliance in this case. Or petitioners may file claims of privilege that the district court may sustain, or the privilege log or an *in camera* inspection may reveal to the district court that the information sought is not relevant or may be withheld for some other reason.

Fourth, petitioners present this case as if the trial judge had already rejected all of petitioners' claims applicable to particular documents or interrogatories and issued an order compelling petitioners to respond. They further assume that the judge would force the Vice President and perhaps others to comply with the order or be held in contempt, with jail and/or daily fines to follow, as day follows night. And if they wished to avoid contempt, they would be compelled to comply, thereby mooting any claim that the discovery order was improper because the cat would already be out of the bag.

But the Federal Rules do not limit a trial judge's options in that way, nor do they result in procedures that deny parties resisting discovery a meaningful opportunity to obtain appellate court review of allegedly unlawful discovery orders. Rule 37(b)(2) provides for a wide range of sanctions short of contempt, such as (A) ordering that certain facts be taken as having been established for purposes of the case; (B) precluding a disobedient party from opposing certain claims or introducing certain evidence; or (C) striking parts of the pleadings or rendering a default judgment. Although respondents have asked the district court to impose sanctions against petitioners for their recalcitrant refusal to comply with discovery, the district court has to date declined to do so. More importantly, it is nothing short of premature speculation that the district court would have chosen the contempt option in lieu of other sanctions, had the discovery proceedings reached that point.[3]

If one of the lesser sanctions were chosen, the worst that could happen to petitioners is that the district court would enter judgment that defendants had violated FACA and order them to comply by making certain disclosures. Even then, the status quo would probably be maintained because either the district court or the court of appeals would probably stay the disclosure portions of the order pending appeal. At that time, there would be an appealable final judgment, from which petitioners could ask the court of appeals to review the previously non-reviewable order of

---

[3] Even in *Nixon* where the only feasible remedy was contempt, this Court made clear that ordinarily it would require a person refusing to comply with a discovery order to be held in contempt, but that insisting on such a requirement there would be "peculiarly inappropriate due to the unique setting in which the question arises." 418 U.S. at 691.

July 11, 2002, as well as any other interlocutory orders, such as any sanctions under Rule 37(b), that become appealable along with the final judgment. Thus, far from denying petitioners an appeal over discovery and other orders that they consider unlawful, the district court has provided more than ample procedures that assure petitioners will ultimately have the right to one appeal, from a final judgment, that includes any otherwise non-moot order made along the way. By contrast, petitioners have interrupted this orderly procedure by seeking writs of mandamus and interlocutory appeals of non-final orders, instead of either answering the discovery or standing on what they believe to be the correct view of the law and allowing the court of appeals to decide whether they are right once a final judgment has been entered against them.

To be sure, if they follow the path of insisting on their "no discovery" position, and the district court enters a preclusion order, petitioners would run the risk that the court of appeals might disagree with them on the discovery question. In that case they would lose the opportunity to answer the discovery and then perhaps prevail on the merits. But that is the inevitable consequence of the final judgment rule and the operation of Rule 37(b) in cases where a party refuses to respond to discovery, whether on principle or for any other reason. Petitioners are represented by sophisticated counsel, and they will surely be advised of the consequences of their choice once the case is back in the district court. But if they decide to answer the discovery, and not continue their massive resistance, the choice to forgo their appellate rights down the road will be theirs. Unlike *Nixon*, it is not "now or never," let alone is there any immediate or even any realistic possibility that the Vice President or any other defendant will be held in contempt of court for failing to respond to this

discovery. Therefore, even if the appeal here had been timely, there would be no basis to apply the collateral order doctrine to rescue petitioners from the choices that they will have to make in the district court.[4]

There Was No Mandamus Jurisdiction in the Court of Appeals.

The court of appeals also lacked mandamus jurisdiction over petitioners' attempt to obtain interlocutory review of the district court's refusal to dismiss the complaint before allowing respondents any discovery. Once again, as with the attempt to use the collateral order to obtain an appeal, mandamus was either too late or premature. To the extent that mandamus might lie over a denial of a motion to dismiss, the writ should have been filed promptly after the July 11, 2002 order was entered and not months later. Although FRAP Rule 4(a) does not apply to mandamus petitions, the absence of a specific limitation period for mandamus relief does not permit petitioners to evade the 60-day rule by recasting their appeal as a writ of mandamus. *Helstoski v. Meanor*, 442 U.S. 500, 508 n. 4 (1979).

Prohibiting such evasion is particularly appropriate here where, if any review is proper at this stage of the case, it is because the order being reviewed is similar to orders falling within the collateral order doctrine. *Id.* at 505-06 (mandamus available only when there is no other practical

---

[4] The only other appellate case cited by petitioners to support appellate jurisdiction is *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). In that case, however, there was a final judgment entered in the district court, and hence it has no bearing on whether the court of appeals had appellate jurisdiction here where all orders are interlocutory.

remedy). Petitioners did not seek mandamus on the ground that the lower court ordered them to provide specific information that they contended was privileged. Rather, they sought a form of discovery immunity – a claim that would be reviewable at this stage only if its denial were a collateral order, which is subject to the 60-day rule.

Even if the 60-day rule did not apply, petitioners' mandamus claim should be barred by laches. *In the Matter of the Eastern Cherokees,* 220 U.S. 83 (1911). For over four months after petitioners knew that discovery was inevitable, they continued to delay and obstruct the proceedings in an effort to postpone having to respond or even object to specific items of discovery. So successful were they that, more than a year after they were supposed to provide documents and answers to interrogatories, they have not produced a single piece of paper, responded to a single question, or even provided a single specific objection to any of respondents' discovery requests. Instead, they waited four months before taking an appeal that, on petitioners' theory, was as ripe on July 11, 2002, as it would ever be. It has always been clear to all parties and the lower courts that this case is about access to information about what roles private parties played on the Task Force, and by these tactics, petitioners have significantly thwarted the efforts of respondents to make that information public. If there were ever a case for applying laches to a request for a writ of mandamus to the district court, this is surely it.

Finally, if this dispute were truly about discovery and not a claimed immunity, there would still be no basis for mandamus in the court of appeals because there is no order compelling specific discovery that might arguably form the basis for a writ of mandamus. Petitioners cite no authority

for the proposition that blanket objections to discovery are properly the subject of writs of mandamus in the courts of appeals or of claims of immunity of any kind, let alone the unique variety asserted here. Even if mandamus might be available to protect against the violation of a claim of privilege with respect to a specific disclosure, which has not yet occurred, it has never been invoked in this situation in which petitioners seek to use the writ as an end-run on the prohibition against interlocutory appeals of discovery orders. At the very least, the failure of the district court to interrupt discovery before the defendants have even filed their objections is not such a violation of a clear right of petitioners as to warrant the use of mandamus, particularly since petitioners will be able to obtain full appellate review of their legal claims after entry of a final judgment in the district court.

II. THE MERITS QUESTION PRESENTED DOES NOT WARRANT REVIEW.

Even if the court of appeals (and therefore this Court) had jurisdiction to consider the merits of petitioners' claims of error, the petition seriously overstates the merits of petitioners' defenses as applied to the facts of this case. Petitioners' assertion that allowing this case to proceed will cause serious harms to separation of powers interests is in error for four principal reasons.

First, this case has not proceeded beyond the motion to dismiss stage, in contrast to *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), where this Court reviewed a final judgment based on cross-motions for summary judgment. Under decisions of this Court such as *Morrison v. Olson,* 487 U.S. 654 (1988), and *Nixon v. General Services*

Admin., 433 U.S. 425 (1977) – neither of which the petition cites, although the district court relied on both of them, Pet. App. 100a – separation of powers issues such as these require a balancing of all the relevant considerations, which cannot be properly done on such an incomplete record.

Second, the persons whose claimed constitutional powers are being impeded are the Vice President and lower level White House officials, not the President. None of them has any enumerated powers under Article II of the Constitution that are in any way threatened by this lawsuit. The Task Force that the Vice President chaired was created to advise the President in carrying out his constitutional duties, but it is difficult to understand how requiring the Vice President and the other defendants to respond to the allegations of this lawsuit, long after that advice has been rendered, will impede the Vice President's ability to render advice, now or in the future. To the extent that such a claim is made, it is surely a novel one because no case cited by petitioners involves such a claim on behalf of a Vice President or the other petitioners, nor does any case support such a claim as a means of avoiding all discovery.[5]

---

[5] While the discovery matters were being litigated in the district court, petitioners sought outright dismissal of the claims against Andrew Lundquist, the Executive Director of the Task Force, who had been sued by Sierra Club in his official capacity, on the ground that he was no longer a federal employee. As Executive Director, Lundquist had possession of documents that bore directly on the factual issues presented, as well as personal knowledge of what took place. Had the government moved to substitute his successor under F.R.C.P. 25(d)(1), respondents would not have objected, but that is not what was sought. Indeed, the continued presence in the case of Lundquist or his successor should have been welcomed by petitioners since it would have enabled them to suggest that the Vice President did not have to respond personally

(continued)

Third, *Public Citizen* involved a claim that the President, through his Attorney General, was *utilizing* advice from a committee established by the American Bar Association in connection with his judicial appointments. By contrast here, the President himself *established* the energy Task Force, bringing into play a different prong of FACA than was at stake in *Public Citizen.* This difference is significant because the separation of powers balance is quite different when the President, as is alleged here, chooses to establish an advisory committee, and then agency heads and other executive branch officials whom he has assigned to the committee do not comply with FACA. At the very least, the differences are such that petitioners' contention that this case is controlled by *Public Citizen* (even if the three-Justice concurring opinion could be treated as a majority ruling) cannot be accepted at face value.

Fourth, the claim that the district court erred in allowing respondents any discovery in this case is unsupported by any authority relied on by petitioners, in large part because there is no appellate case with facts like this or in which the Government has taken such an extreme position on discovery. According to the Government, the case must be decided on the administrative record, which, it contends, consists solely of the order creating the Task Force, the final report, and a letter from the Counsel to the Vice

---

to the interrogatories and document production requests, unless respondents could show some reason why the staff of the Task Force could not do so. Thus, if there are separation of powers issues in this case, the dismissal request by petitioners served to increase, not alleviate, them.

President. The first two documents do no more than identify the persons who were official members of the Task Force, a matter on which there is no dispute. Those documents do not respond to the claim that the Task Force and its subgroups included additional, fully participating non-government members, which would make them advisory committees under FACA. The other item is a reply to a demand letter from Judicial Watch, and it does no more than state petitioners' conclusion that FACA is inapplicable because only federal officials were members of the Task Force.[6]

Petitioners insisted below that the district court had to decide this case, under either the APA or mandamus, solely based on these three pieces of evidence. They contend that the three items constitute the "administrative record" from which the district court must decide the factual issue of

---

[6] Petitioners also point to 35,000 pages of documents originally released in separate FOIA suits and later produced in these cases by the agency defendants, plus an affidavit dated September 3, 2002, from Karen Knutson, who was the Deputy Director of the Task Force. C. A. App. 257-262. Neither the documents nor the affidavit were submitted by defendants in support of their motion to dismiss, and hence they cannot be the basis of any claim of error in this Court. Moreover, the documents contain substantial redactions and do not purport to show the workings of the Task Force and its sub-groups. As for the Knutson affidavit, it was untested by discovery and hence could not be the basis for a summary judgment motion under Rule 56, let alone a motion to dismiss under Rule 12(b)(6). Furthermore, the Knutson affidavit was submitted primarily to avoid discovery and was coupled with a request to allow the defendants to move for summary judgment. Since petitioners had chosen not to file such an affidavit and seek summary judgment initially, the district court was acting well within its discretion in not giving defendants a second try before any discovery could take place. In addition, Ms. Knutson claimed no personal knowledge of the activities of the sub-groups, which were a major focus of the Sierra Club complaint.

whether non-federal personnel were, in practice if not in name, members of the Task Force and its subgroups. If that theory were sustained, it would insulate all claims of non-compliance with FACA from any discovery by allowing a defendant to decide for itself what constitutes the administrative record. Indeed, on that theory, if the Task Force had chosen not to list its members in the final report, and its counsel had chosen not to respond to the letter from Judicial Watch, the entire record would consist of the order creating the Task Force, and nothing that happened after its creation would have been relevant.

It is important to note that the principal discovery that plaintiffs are now seeking is the documents that were produced as part of the operation of the Task Force and that would show whether non-government persons participated extensively in its work. In that sense, the intrusion on normal government decisional processes by the discovery sought here is less than what was required in *Citizens to Preserve Overton Park v. Volpe*, *supra,* where federal officials had to create new documents and/or give testimony, explaining what they had done, and on what basis, regarding the decision under challenge there. 401 U.S. at 420. Surely, if documents exist that show who attended what meetings and who participated in drafting the report and recommendations of the Task Force, they would be highly relevant on these questions and would not be burdensome to locate or produce. In a situation like this, where there is no "docket" of any kind, there is no authority that allows a federal defendant to define the administrative record in a way that makes meaningful judicial review impossible. At the very least, this issue is not one that this Court should consider on this record, especially when the court of appeals, which sees scores of administrative law cases each year, has not passed on it.

There is one final reason why the petition should be denied. Because the petition has been filed only on behalf of the Vice President, the Task Force and its former staff members, *see, supra,* note 1, even if all the relief sought were granted, the cases would continue against the remaining defendants, who are all agency heads and can be sued under the APA and mandamus. Discovery would proceed against them because, presumably, they also have copies of at least some documents showing who was invited to and attended various meetings and who worked on and/or saw various drafts of Task Force documents, including recommendations. Since that discovery will continue no matter what this Court were to say about the right to sue the Vice President (and perhaps even members of his staff), nothing would be gained – except even further delay – if this Court should grant the petition. Coupled with the lack of finality in the district court, the posture of this case makes this a singularly inappropriate vehicle for reaching out to explore the issues that petitioners seek to have resolved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Alan B. Morrison
(Counsel of Record)
Public Citizen Litigation Group
1600 20th Street, NW
Washington D.C. 20009
(202) 588 7720

David Bookbinder
Sierra Club Environmental
Law Program
408 C Street, NE
Washington D.C. 20002
(202) 548 4598

Alex Levinson
Sanjay Narayan
Sierra Club Environmental
Law Program
85 Second Street
San Francisco CA 94104
(415) 977 5769

Attorneys for Respondent
Sierra Club

October 2003

ADDENDUM

DISTRICT COURT CAPTION

PLAINTIFFS' INTERROGATORIES

1. Please state the dates, times, locations of, and identify all persons who were present at each meeting of the Task Force.

2. For each Task Force member, please provide a description of the member's role in the preparation of the Report and the activities of the Task Force;

3. Please identify all Task Force staff, personnel, consultants, employees, and all other persons who participated, in any manner, in the activities of the Task Force or the preparation of the Report.

4. For each person listed in response to Interrogatory 3, above, please provide:

a) A description of the person's role in the activities of the Task Force and in preparation of the Report.

b) A list of all meetings relating to the preparation of the Report and/or the activities of the Task Force in which the person participated, including the date and time of the meeting and identity of all persons who participated at the meeting.

5. Please list all federal agencies, offices, or other entities that participated, in any manner, in Task Force activities or preparation of the Report.

6. For each agency, office, or entity listed in response to Interrogatory 5, above, please:

a) Provide a description of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

b) Identify all persons who were involved with the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

i) For each person listed in response in Interrogatory 6(b), above, describe the person's role in of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

ii) For each person listed in response to Interrogatory 6(b), above, please provide a list of all meetings relating to the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report, in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting;

7. Please list all Sub-Groups that participated, in any manner, in the activities of the Task Force and/or the preparation of the Report.

8. For each Sub-Group listed in response to Interrogatory 7, above, please:

a) describe the role or function of the Sub-Group in the activities of the Task Force and/or the preparation of the Report;

b) identify all persons who participated in the activities of the Sub-Group;

c) list all meetings of the Sub-Group, including the date and time of the meeting and the identity of all Persons who participated at the meeting.

9. For each Person listed in response to Interrogatory 8(b), above, please:

a) Describe the person's role in the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s).

b) list all meetings relating to the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s), in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting.

PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force.

2. All documents establishing or referring to any Sub-Group.

3. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of any Sub-Group.

4. All documents identifying or referring to any other persons participating in the preparation of the Report or in the activities of the Task Force or any Sub-Group.

5. All documents concerning any communication relating to the activities of the Task Force, the activities of any Sub-Groups, or the preparation of the Report, between any person (excluding full-time federal employees) and

(a) the Task Force;

(b) any member of the Task Force;

(c) any staff or personnel of the Task Force;

(e) any Sub-Groups.

(f) any members of any Sub-Groups

(g) any staff or personnel of any Sub-Groups.

6. All documents concerning any communication relating to the activities of the Task Force, the activities of Sub-Groups, or the preparation of the Report between any person (excluding full-time federal employees) and

(a) the Department of Energy, or any employee or agent of the Department of Energy;

(b) the Department of Commerce, or any employee or agent of the Department of Commerce;

(c) the Department of Agriculture, or any employee or agent of the Department of Agriculture;

(d) the Department of Interior, or any employee or agent of the Department of Interior;

(e) the Department of Treasury, or any employee or agent of the Department of Treasury;

(f) the Department of Transportation, or any employee or agent of the Department of Transportation;

(g) the Environmental Protection Agency, or any employee or agent of the Environmental Protection Agency.

7. All documents concerning activities of the Task Force after September 30, 2001.

8. All documents concerning matters discussed in the Janaury 3, 2002 letter from David Addington, counsel to the Vice President, to Henry Waxman, including but not limited to the October 10, 2001 meeting between a Task

Force staff member and representatives of Enron Corporation.

Respectfully submitted,

Attorneys for the Plaintiffs

Supreme Court, U.S.
FILED
OCT 31 2003
OFFICE OF THE CLERK

No. 03-475

In the Supreme Court of the United States

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT JUDICIAL WATCH, INC.

Paul J. Orfanedes
James F. Peterson*
JUDICIAL WATCH, INC.
501 School Street, S.W., Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Respondent Judicial Watch, Inc.

* Denotes Counsel of Record

QUESTION PRESENTED

Whether the Court of Appeals' denial of Petitioners' request for mandamus relief and attempted interlocutory appeal of the district court's order that they are subject to discovery creates a conflict with any decision of this Court or any circuit court or raises an important question of federal law that has not been decided by this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. The Court of Appeals' Denial of Mandamus Relief Was Appropriate and Does Not Warrant Review by This Court 6

II. The Court of Appeals Correctly Applied the Law Concerning Collateral Review 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **Page**

Byrd v. Reno, 180 F.3d 298 (D.C. Cir. 1999) 8

Clinton v. Jones, 520 U.S. 681 (1997) 8

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) 7

Kerr v. United States Dist. Court, 426 U.S. 394 (1976) 6, 7

In re Kessler, 100 F.3d 1015 (D.C. Cir. 1997) 8

United States v. Nixon, 418 U.S. 683 (1974) 4, 8

Vermont Yankee Nuclear Corp. v. NRDC, 436 U.S. 519 (1978) 6

Will v. United States, 389 U.S. 90 (1967) 6

Statutes and Rules

28 U.S.C. § 1291 8

28 U.S.C. § 1292 3

Federal Advisory Committee Act, 5 U.S.C. App.1 ..... *passim*

Sup. Ct. Rule 10 5

STATEMENT OF THE CASE

The critical facts for the purpose of review of the Petition For a Writ of Certiorari ("Petition" or "Pet.") are relatively few. This case involves the continuing effort of the Bush Administration to keep secret records relating to its energy policy task force, known as the National Energy Policy Development Group ("NEPDG"). In July 2001, Respondent Judicial Watch, Inc. ("Judicial Watch") filed suit alleging that, along with certain high-level government officials, private executives and lobbyists representing the energy industry were invited to participate in the NEPDG as it carried out its mission of developing a "national energy policy designed to help . . . promote dependable, affordable, and environmentally sound production and distribution of energy for the future." *In Re: Richard B. Cheney*, 334 F.3d 1096 (D.C. Cir. 2003) (set forth in Appendix to Petition ("Pet. App") at page 2a (citing Mem. Establishing NEPDG, Jan. 29, 2001)).

Judicial Watch alleged that the NEPDG failed to comply with the procedural requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 1, and sought, among other things, a judgment declaring Defendants to be in violation of FACA and an order requiring release of a "full and complete copy of all records . . . made available to or prepared for Defendant NEPDG," as well as "detailed minutes of each meeting of Defendant NEPDG . . . that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by Defendant NEPDG." Judicial Watch Compl. ¶ 22. Shortly thereafter, Respondent Sierra

Club filed a similar lawsuit in the U.S. District Court for the Northern District of California, which was subsequently consolidated with Judicial Watch's.

Petitioners moved to dismiss, arguing, as they do now, that "application of FACA to the NEPDG's operations would directly interfere with the President's express constitutional authority" and that "such an expansive reading of FACA would encroach upon the President's constitutionally protected interest in receiving confidential advice from his chosen advisers, an interest that is also rooted in the principle of separation of powers." Pet. 4a-5a (citing Mem. in Support of Mot. to Dismiss at 3 (D.D.C. Mar. 8, 2002)). The district court appropriately deferred ruling on the Petitioners' separation of powers claim, explaining that, "after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA [to the Vice President]." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 54-55 (D.D.C. 2002). The district court was fully cognizant that, "while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here." *Id.* at 55. The court then denied Petitioners' motion to dismiss, approved Respondents' discovery plan, and unambiguously ordered Petitioners to "fully comply with the [discovery] requests," "file detailed and precise objections to particular requests," or "identify and explain their invocations of privilege with particularity." Pet. 5a (citing Order Approving Disc. Plan at 2 (D.D.C. Aug. 2, 2002)).

Petitioners did not comply with the court's order. On behalf of the Vice President, Petitioners filed a motion for a protective order, arguing essentially that the Vice President was immune to discovery, as it allegedly would violate the constitutional separation of powers. Petitioners then sought permission to file a motion for summary judgment on the scanty administrative record developed thus far.

The court denied Petitioner's motion for a protective order and request to file for summary judgment, and directed defendants to "produce non-privileged documents and a privilege log." Pet. 6a (citing Order Den. Mots. for Recons. and Protective Order at 1 (D.D.C. Oct. 17, 2002)). The court indicated its willingness to address Petitioners' concerns by offering to either review allegedly privileged information *in camera* or appoint a special master to review privilege claims. *Id.* (citing Tr. of Omnibus Mots. Hr'g at 4:15-5:12 (D.D.C. Oct. 17, 2002)).

Again, Petitioners did not comply with the court's order. Instead of responding to the discovery requests and filing a privilege log (or even completing an internal review of the documents at issue), Petitioners asked for certification under 28 U.S.C. § 1292(b) for an interlocutory appeal. After the district court declined, Mem. Op. and Order (D.D.C. Nov. 27, 2002), Petitioners filed an emergency motion for writ of mandamus in the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals"), seeking an order "vacating the discovery orders issued by the district court, directing the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and directing that the Vice President be dismissed as a defendant." Pet. 7a

(citing Emergency Pet. for Writ of Mandamus at 20). The Vice President also filed a notice of appeal from the district court's order denying the motion to dismiss and from the various discovery orders.

The Court of Appeals firmly rejected the petition for a writ of mandamus and granted Respondents' motion to dismiss the appeal. The Court of Appeals held that Petitioners failed to satisfy the heavy burden required to justify the extraordinary remedy of mandamus. Pet. 19a. The panel majority unsurprisingly concluded that the district court's legal rulings could be fully considered on appeal following final judgment, and Petitioners' claims of harm could be fully cured in the district court through, as promised by the court, narrow, carefully focused discovery. As anticipated by the Court of Appeals, either the Vice President then would have no need to claim privilege, or if he did, then the "district court's express willingness to entertain privilege claims and to review allegedly privileged documents in camera would prevent any harm." The Court of Appeals also dismissed the Vice President's appeal, concluding that the collateral order doctrine did not apply, nor did *United States v. Nixon*, the only authority relied on by Petitioners. These two narrow issues ruled upon by the Court of Appeals – the petition for mandamus and the dismissal of the interlocutory appeal – are the only ones properly before this Court.

Petitioners now seek relief from this Court, having defied repeatedly the discovery orders of the district court, and asserting a wholly unprecedented theory of immunity from discovery. While this "unique" theory has failed at every stage below, Petitioners have succeeded splendidly in

delaying the advancement of this case. The proposals developed by the NEPDG currently are moving through Congress, while critical information regarding how these proposals were developed remains secret from the public. This transparent strategy of "running out the clock" should not be tolerated.

REASONS FOR DENYING THE WRIT

In this Court and below, Petitioners have made repeated attempts to transform the actual issues before the Court of Appeals into ones of urgent constitutional concern. As the Court of Appeals correctly held, however, no such issues exist. The two familiar and straightforward issues of mandamus and collateral review ruled on by the Court of Appeals raise no concerns justifying review by this Court.

Petitioners wholly fail to establish that the Court of Appeals misapplied the doctrines of mandamus or collateral review – the only issues that were before the Court of Appeals. The Court of Appeals rejected Petitioners' brazen and unprecedented argument that the Vice President is immune from discovery and should be relieved from the district court's discovery orders. The Court of Appeals' decision not to grant interlocutory relief on this novel theory raises no "compelling" reason warranting review. Sup. Ct. Rule 10. Petitioners have cited no conflict with a decision of this Court or any other circuit court that the Court of Appeals failed to follow.[1] Any constitutional issues that are of concern to Petitioners are entirely

[1] Petitioners concede that no circuit conflict exists. Pet. 12 n.2.

speculative and were not at issue before the Court of Appeals.

I. The Court of Appeals' Denial of Mandamus Relief Was Appropriate and Does Not Warrant Review by This Court.

The Court of Appeals' ruling was straightforward and unsurprising. The court plainly stated that it was "bound by well-established rules of both the Supreme Court and this court" in regard to the "drastic" remedy of mandamus, which is to be "invoked only in extraordinary situations." Pet. App. 7a-8a (quoting directly from *Kerr v. United States Dist. Court*, 426 U.S. 394, 401 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967)). The Court of Appeals' denial of mandamus relief was entirely appropriate, as Petitioners have never been able to establish a harm they will suffer that is not entirely speculative. As Chief Judge Edwards succinctly stated, Petitioners "can point to no harm because [they have] yet to specify any privileged materials or otherwise cite objections for consideration by the District Court." Pet. 27a (concurring). Petitioners do not cite, much less attempt to explain, how the Court of Appeals "seriously misread" the holding in *Kerr* or otherwise misapplied the hoary doctrine of mandamus. *Vermont Yankee Nuclear Corp. v. NRDC*, 436 U.S. 519 (1978).

Instead, Petitioners consistently confuse the issues before this Court, alleging that "fundamental separation-of-powers questions arise from the district court's orders compelling the Vice President" and other advisors to "comply with broad discovery requests." Pet. 6.

Petitioners' fundamental objection is that the FACA, as allegedly interpreted in this and prior cases, is unconstitutional. Pet. 8-16. As the Court of Appeals noted, constitutional issues involving the separation of powers may – at some point – arise in this case. Pet. 19a. That point, however, has not arrived. This Court, of course, refrains from granting review of cases involving prematurely-raised constitutional issues. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 70-81 (1961).

Petitioners have not been ordered to disclose any privileged or other information. Furthermore, they have not offered any evidence of how the President or Vice President would be so "distracted" by his counsels' mere review of documents and assertions of privilege. Pet. 21. The "parade of horribles" on which Petitioners dwell is entirely speculative. Petitioners argue only that the lower courts' decisions "*threaten*" substantial interference with the Executive Branch. Pet. 9 (emphasis added). No court has issued any order that requires compliance with any overly broad or intrusive discovery or inappropriate disclosure of documents. Instead, the district court promised "tightly reined" discovery to allay any such concerns by Petitioners. *See* Pet. App. 19a. Hence, Petitioners' complaints are entirely premature. The Court of Appeals correctly and predictably held, closely following *Kerr*, that the "drastic" remedy of mandamus relief was not necessary to address an entirely hypothetical concern. *Id.* at 18a. Petitioners have failed to establish how this holding is in conflict with other decisions or involves questions of federal law not previously considered by the Court.

II. The Court of Appeals Correctly Applied the Law Concerning Collateral Review.

Petitioners provide no basis for their contention that the Court of Appeals' decision justifies review of the district's discovery orders under 28 U.S.C. section 1291. As Chief Judge Edwards plainly stated, discovery orders are appealable only after "entry of final judgment in the underlying case, or under the "collateral order" doctrine upon entry of an order holding the litigant in criminal contempt." Pet. App. 26a (citing *Byrd v. Reno*, 180 F.3d 298, 302 (D.C. Cir. 1999); *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1997)). Accordingly, in the absence of a final judgment in the underlying case (or an order of criminal contempt), the Court of Appeals denied review under section 1291.

The Court of Appeals correctly noted that the only authority cited by Petitioners in support of collateral review, in the absence of a final order, was *United States v. Nixon*, 418 U.S. 683 (1974). Remarkably, Petitioners still rely on *Nixon* (Pet. at 23) even though *Nixon* involved an order *after* the President's assertion of executive privilege. In striking contrast, Petitioners make the wholly unsupported argument that the Vice President is immune from discovery (Pet. 22-23) and not required to assert executive privilege, any other privilege, or otherwise comply with discovery. Such a claim is risible after *Clinton v. Jones*, 520 U.S. 681 (1997), established that even the President is not immune from civil discovery, even when the case relates to matters outside his official duties. The Court of Appeals correctly followed this clear precedent, and declined to consider premature and

unprecedented theories on an attempted interlocutory appeal. Thus, Petitioners again have failed to identify any conflicting opinions or important questions of federal law not previously ruled upon by this Court that justify granting the Petition.

CONCLUSION

For the foregoing reasons, Respondent Judicial Watch, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Paul J. Orfanedes
James F. Peterson*
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Respondent
Judicial Watch, Inc.

October 2003

* Denotes Counsel of Record

Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
A. Review is warranted because the decisions below improperly expand the scope of FACA, render FACA unconstitutional, and conflict with this Court's decisions governing the separation of powers	2
B. The questions presented are neither premature nor stale, and there are no jurisdictional obstacles that preclude this Court's review	4

TABLE OF AUTHORITIES

Cases:

Association of Am. Physicians & Surgeons, Inc. v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993)	2
Clinton v. *Jones*, 520 U.S. 681 (1997)	9, 10
Ferri v. *Ackerman*, 444 U.S. 193 (1979)	9
Franklin v. *Massachusetts*, 505 U.S. 788 (1992)	4
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)	4
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982)	9
Papandreou, In re, 139 F.3d 247 (D.C. Cir. 1998)	7
Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440 (1989)	2, 7
United States v. *Nixon*, 418 U.S. 683 (1974)	8

Constitution and statute:

U.S. Const.:	
Art. II	4, 7
§ 2, Cl. 1	3
§ 3	3
5 U.S.C. App. 2, § 3(2)	2, 5

In the Supreme Court of the United States

No. 03-475

RICHARD B. CHENEY, VICE PRESIDENT
OF THE UNITED STATES, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents do not dispute that the district court's orders here—which compel the Vice President and other close presidential advisors to comply with respondents' broad discovery requests and which seek information about the process by which the President received advice on important national policy matters from his closest advisors—raise fundamental separation-of-powers questions. Rather, they contend that petitioners' objections are premature (or, alternatively, stale) and that the court of appeals lacked jurisdiction to decide them. See Sierra Club Br. in Opp. 8- 9; Judicial Watch Br. in Opp. 5-6.

Respondents are mistaken. The important separation-of-powers questions raised in the petition for certiorari are properly presented in this case, are neither premature nor stale, and warrant review by this Court. In addition, the court of appeals had both mandamus and appellate jurisdiction to decide those issues, and its jurisdictional holdings to the contrary themselves conflict with this Court's decisions and improperly shield separation-of-powers violations from

meaningful judicial review. Accordingly, the petition for certiorari should be granted.

A. Review Is Warranted Because The Decisions Below Improperly Expand The Scope Of FACA, Render FACA Unconstitutional, And Conflict With This Court's Decisions Governing The Separation Of Powers

As petitioners have demonstrated (Pet. 8-20), the court of appeals' so-called "de facto membership" doctrine adopted in *Association of American Physicians & Surgeons, Inc.* v. *Clinton* (*AAPS*), 997 F.2d 898, 915 (D.C. Cir. 1993), particularly as applied in this case, effectively eliminates FACA's express (and constitutionally necessary) exception for advisory groups comprised solely of government officials or employees, see 5 U.S.C. App. 2, § 3(2). As a result, the decisions below conflict with the text of FACA and with this Court's cases governing the separation of powers and judicial review of Executive Branch actions. Respondent Judicial Watch does not even attempt to address the merits of petitioners' arguments, instead relying solely on assertions that those separation-of-powers arguments are premature and that the court of appeals lacked jurisdiction to address them. Judicial Watch Br. in Opp. 6-7. Respondent Sierra Club briefly responds to the merits of petitioners' arguments (Br. in Opp. 19-24) and raises four objections to them, each of which is mistaken.

The Sierra Club's first "merits" argument—that "this case has not proceeded beyond the motion to dismiss stage" and is therefore premature (Br. in Opp. 19)—does not address the merits of petitioners' arguments at all, but merely repackages its mistaken jurisdictional arguments. See Part B, *infra*.

The Sierra Club's second and third merits arguments—that petitioners' separation-of-powers arguments fail under *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440 (1989), because (a) they relate to the powers of the Vice President and other close presidential advisors, rather than the President's powers, and (b) the President *himself*

"established" the alleged advisory committee in this case, whereas in *Public Citizen*, the committee was established by the American Bar Association—are mistaken and internally inconsistent. As the petition makes clear (*e.g.*, Pet. 8-9), the unconstitutional interference with the President's authority under the Recommendations and Opinions Clauses, see U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3, at issue here, like the intrusion into the President's nomination power at issue in *Public Citizen*, implicates powers that are expressly vested in the *President* by the Constitution. That the Vice President and other close presidential advisors assert the interference with *presidential* power here has no more relevance than the fact that the Department of Justice, among others, asserted the violation in *Public Citizen*. If anything, the greater relative proximity of the petitioners here to the President only underscores the separation- of-powers difficulties raised by the decisions below.

Thus, while the Sierra Club may be correct that the President's role in establishing the advisory group in this case makes "the separation of powers balance * * * quite different" from that in *Public Citizen* (Br. in Opp. 21), *all* of the relevant differences only underscore the gravity of the separation-of-powers implications of the decision below and confirm that the construction of FACA adopted below is flawed. Here, the President sought advice from his closest advisors *inside* the Executive Branch, rather than from an outside group as in *Public Citizen*; the President created an advisory group of government officials for the express purpose of advising him (and in a manner that rendered FACA inapplicable), rather than rely on a pre-existing group formed for different purposes; and the construction of the statute that avoids the separation-of-powers violation—rejecting the textually unsupported "de facto membership" doctrine—is far more obvious than was the construction of the statutory term "utilized" at issue in *Public Citizen*. Congress, after all, expressly exempted groups comprised of Executive Branch officials, thereby avoiding the very

separation-of-powers problems that will now become routine under the decisions below.

Finally, the Sierra Club complains (Br. in Opp. 21-22) that petitioners' arguments against any discovery in this context lack precedent and would insulate claims of non-compliance with FACA from discovery. But the real novelty lies in the lower courts' adoption of the extra-statutory de facto membership doctrine and their disregard for this Court's decisions affording a presumption of regularity to executive action and limiting discovery in APA and mandamus actions. See Pet. 13-20. In *Public Citizen*, as well as in *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992), and *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), this Court took pains to construe broad statutory language regulating or requiring disclosure of Executive Branch communications to avoid direct interference with the President and his closest advisors. By ordering unprecedented and constitutionally troubling discovery against the Vice President based solely on an unsupported allegation that a presidential advisory group had unauthorized de facto members, the courts below have turned those decisions on their heads and have invited the very separation-of-powers concerns this Court has so consistently sought to avoid. FACA expressly allows the President to establish committees to receive advice from government employees without triggering FACA's disclosure requirements. The decisions below allow any plaintiff to insist on that statutorily precluded disclosure through discovery. Those decisions plainly frustrate the statute and intrude on the President's Article II powers. This Court's review is necessary.

B. The Questions Presented Are Neither Premature Nor Stale, And There Are No Jurisdictional Obstacles That Preclude This Court's Review

As petitioners have explained (Pet. 21-25), the court of appeals also erred in holding that it lacked mandamus or appellate jurisdiction because the separation-of-powers dispute

here was akin to an ordinary discovery dispute and just as premature. Respondents devote most (and, in the case of Judicial Watch, all) of their briefs to that mistaken notion.

The fundamental error in respondents' arguments and in the court of appeals' reasoning is that there is no meaningful difference—either in real-world effects or in the separation-of-powers concerns raised—between the sweeping discovery ordered in this case and the disclosure obligations of FACA that would apply if a court ever determined that the National Energy Policy Development Group violated the statute. Congress enacted a statutory exception for advisory groups consisting only of government officials and employees, which ameliorates the separation-of-powers difficulties posed by FACA. 5 U.S.C. App. 2, § 3(2). Nevertheless, under the decisions below, effectively the same remedies imposed upon a final adjudication of a FACA violation—with the same separation-of-powers difficulties—will be triggered by the mere allegation that a committee's membership deviated in practice from that established by the President. Far from rendering separation-of-powers problems premature, the imposition of such problematic disclosure obligations based on mere allegations only exacerbates them.

Paradoxically, the Sierra Club argues, for the first time, that the court of appeals lacked jurisdiction because petitioners' separation-of-powers claims were not only premature, but stale. According to the Sierra Club, because petitioners' separation-of-powers arguments throughout this litigation have been essentially the same—namely, that in the circumstances of this case, the legislative and judicial powers cannot extend to compelling a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President and other senior presidential advisors—petitioners were required to seek appellate review of the district court's denial of their motion to dismiss, rather than waiting

to challenge subsequent discovery orders on related constitutional grounds.

That contention is meritless. Petitioners' argument in their motion to dismiss that application of FACA's disclosure requirements would violate fundamental separation-of-powers principles does not preclude them from arguing—either in the district court or in the court of appeals on mandamus or appellate review—that discovery orders requiring even more disclosure than the statute itself based on a mere allegation, as opposed to an adjudication, of unauthorized de facto members violates the separation of powers, *a fortiori*. The district court's unprecedented discovery orders violate the Constitution's separation of powers, without regard to whether it should have granted petitioners' motion to dismiss. And it was those discovery orders—not the denial of the motion to dismiss—that made immediate mandamus and appellate review by the court of appeals imperative. Indeed, petitioners contended below, after denial of the motion to dismiss, that the district court could resolve this case on the merits based on the available administrative record, without any discovery. See Pet. 18-20.

But while meritless, the Sierra Club's misplaced staleness argument does serve to demonstrate the folly of respondents' prematurity arguments. For example, it makes clear that petitioners' separation-of-powers arguments are broader than claims of privilege to individual documents, and instead are more in the nature of a claim of immunity from discovery, at least where the plaintiff fails to overcome the well-established presumption of regularity afforded to Executive Branch actions. See, *e.g.*, Sierra Club Br. in Opp. 11 (acknowledging that petitioners have consistently argued that they "have a constitutional right not to submit to any discovery in cases of this kind, presumably on some kind of immunity theory"). The court of appeals made a similar acknowledgment, but failed to recognize its jurisdictional implications. See Pet. 23 n.7.

In this case, federal agencies have produced tens of thousands of pages of materials in response to respondents' discovery requests. Petitioners, however, have resisted discovery against the Vice President and the President's immediate subordinates into the President's exercise of powers committed exclusively to the President by Article II of the Constitution, including the Opinions and Recommendations Clauses. Because the very essence of petitioners' separation-of-powers objections is that *any* discovery against the Vice President and immediate assistants to the President—let alone discovery tantamount to relief for a proven FACA violation—in the context of the record in this case would violate the separation of powers, it makes no sense to require assertions of privilege over individual documents before allowing mandamus and appellate jurisdiction.

For these reasons, the court of appeals' illogical jurisdictional holdings erect a significant obstacle to vindicating the proper functioning of the separation of powers in all cases where—as here, as well as in *Public Citizen*, see 491 U.S. at 466-467, 486-489—the Executive's claims are broader than and antecedent to assertions of privilege over individual documents. Cf. *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough."). Accordingly, rather than providing a reason to deny the petition for certiorari in this case, the court of appeals' jurisdictional holdings, which threaten to shield separation-of-powers violations from meaningful review, provide an additional ground for certiorari.

The Sierra Club's staleness argument also makes clear that the questions presented in the petition for certiorari were fully raised below. See Sierra Club Br. in Opp. 11 (petitioners' discovery objections in district court "were identical to the ones that they had previously raised—no discovery was proper and the burden of even having to respond with

specific claims of privilege would violate principles of separation of powers"); *ibid.* ("the basis of the Government's claims never changed—no discovery is permitted in this case"). As Judge Randolph observed in his dissenting opinion, "the federal officers have repeatedly argued before the district court and this court that the discovery, as permitted by *AAPS*, violates the separation of powers. * * * The problem here is not that the petitioners failed to make the arguments. The problem is that the majority failed to answer them." Pet. App. 42a n.5.

In addition, the Sierra Club argues that the court of appeals lacked jurisdiction under *United States* v. *Nixon*, 418 U.S. 683 (1974), because contempt was not necessarily imminent and the district court may have imposed sanctions other than contempt if the Vice President had disobeyed its discovery orders. The rationale in *Nixon*, however, did not turn on the particular sanction of contempt, but on the Court's determination that it would be "inappropriate" and "unseemly" "[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling," and that doing so "would present an unnecessary occasion for constitutional confrontation between two branches of the Government." 418 U.S. at 691-692. That rationale is equally applicable regardless of the sanction the district court might choose to impose. Moreover, absent mandamus or an immediate appeal under *Nixon*, the only way that the Vice President could obtain review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery, suffer the indignity of a court-imposed sanction, and then either appeal the sanction or, if the initial sanction were deemed unappealable, invite a more serious (and therefore more "inappropriate" and "unseemly" under *Nixon*) and appealable sanction. Requiring such a procedure is plainly inconsistent with *Nixon*.

Finally, respondents argue that appellate or mandamus jurisdiction in this case would somehow be inconsistent with

this Court's holding in *Clinton* v. *Jones*, 520 U.S. 681 (1997), that the President is not immune to civil litigation stemming from actions or events that occurred before the President began his term in office. Sierra Club Br. in Opp. 13; Judicial Watch Br. in Opp. 8. But arguing that a case like this follows, *a fortiori*, from *Jones* turns *Jones* on its head. *Jones* makes clear that its holding is limited to suits based on the President's *unofficial* conduct. Indeed, it reaffirms this Court's numerous decisions holding that Executive Branch officials are immune to lawsuits for money damages based on their *official* conduct, precisely because such suits threaten to interfere with vital Executive Branch functions. See 520 U.S. at 692-694 (discussing cases). Cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982); *id.* at 763 (Burger, C.J., concurring). Moreover, because *Jones* involved a claim of temporary immunity from suit, the opinion does not discuss, or undermine, the ample authorities limiting unnecessary discovery of high-ranking government officials in the absence of immunity. See Pet. 18-19 & n.4 (discussing such cases).

Of particular relevance here, the Court explained that official immunity exists for Executive Branch officials in part because "[t]he conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy." *Jones*, 520 U.S. at 693 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)). No statute makes that difference more apparent than FACA, which provides every individual with a right to disclosure and a potential lawsuit. In contrast, the Court observed, "because the President has contact with far fewer people in his private life than in his official capacity, the class of potential plaintiffs is considerably smaller and the risk of litigation less intense." *Jones*, 520 U.S. at 702 n.36.

Not only is respondents' effort to rely on *Jones* to defeat certiorari unavailing, but *Jones* squarely supports exercising jurisdiction over this petition. In *Jones*, despite the Court's lopsided rejection of the immunity theory advanced and the interlocutory posture of the case, the Court underscored the

importance of its review of the question. While the Court recognized "the importance of avoiding the premature adjudication of constitutional questions," it reaffirmed its appraisal of the importance of the issue by noting: "The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration." 520 U.S. at 689-690.

Two critical principles prevent every cabinet meeting, indeed every government meeting, from becoming the basis for a potential FACA suit with concomitant distracting discovery: (1) FACA's express exemption of groups consisting only of government officials, and (2) the presumption of administrative regularity. The decisions below effectively eliminate both of those safeguards and in the process push FACA over the constitutional edge. See Pet. App. 31a (Randolph, J., dissenting). The distraction caused by the discovery orders that will become an inevitable feature of the scheme created by the decisions below will provide ample incentives for some to file FACA lawsuits, regardless of their merits. Because the remedy for a proven FACA violation is not materially different from a discovery order in this context, the outcome of such suits will become largely irrelevant, and the discovery ordered will be effectively immune from appellate review. It is difficult to overstate the potential to distract the President and his senior advisors or otherwise to interfere with Executive Branch decisionmaking that could result from such a wholesale reworking of FACA.

* * * * *

For the foregoing reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2003

(6)

Supreme Court, U.S.
FILED
FEB 5 - 2004
OFFICE OF THE CLERK

No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX
VOLUME I

THEODORE B. OLSON
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

ALAN B. MORRISON
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

JAMES F. PETERSON
Judicial Watch, Inc.
501 School Street, N.W.
Suite 500
Washington, D.C. 20024

Counsel of Record
for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 30, 2003
CERTIORARI GRANTED: DEC. 15, 2003

TABLE OF CONTENTS

District Court Docket Entries, No. 01-1530 1
District Court Docket Entries, No. 02-631 8
Court of Appeals Docket Entries 10
Second Amended Complaint, Case No. 01-1530 16
Attachment 1:
Howard Fineman and Michael Isikoff, "Big Energy at the Table," *Newsweek*, May 14, 2001 43
Attachment 2:
Howard Fineman and Michael Isikoff, "A New Capitol Clash," *Newsweek*, Feb. 11, 2002 51
Attachment 3:
David Lazarus, "Memo Details Cheney-Enron Links," *San Francisco Chronicle*, Jan. 20, 2002 57
Attachment 4:
Michael Weisskopf and Adam Zagorin, "Getting the Ear of Dick Cheney," *Time*, Feb. 11, 2002 68
Attachment 5:
Letter from David S. Addington, Counsel to the Vice President, to Rep. Tauzin et al., May 4, 2001 71
Attachment 6:
Transcript of ABC News: *Nightline*, July 25, 2001 84
Attachment 7:
Decision of the Comptroller General Concerning NEPDG Litigation, Jan. 30, 2002 103
Attachment 8:
Letter from Judicial Watch, Inc. to The Hon. Richard B. Cheney, June 25, 2001 109
Attachment 9:
Letter from David S. Addington, Counsel to the Vice President, to Larry Klayman, July 5, 2001 123

Table of Contents—Continued: Page

Attachment 10:
Joseph Kahn, "Cheney Withholds List of those Who Spoke to Energy Panel," *The New York Times*, June 26, 2001, at A17 125
Express Wire Services, "Cheney Won't Give Up Names," June 26, 2001 128
Scott Lindlaw, "Congress Demands List of Participants in Cheney Energy Meetings," *AP*, June 25, 2001 130
Attachment 11:
Letter from David S. Addington, Counsel to the Vice President, to Rep. Henry Waxman, Jan. 3, 2002 134
Complaint, Case No. 02-631 139
Presidential Memo., Jan. 29, 2001 156
Plaintiffs' Proposed Discovery Plan 160
Defendants' Objections to Plaintiffs' Proposed Discovery Plan 166
Transcript of Status Hearing, Aug. 2, 2002 186
Plaintiffs' First Request for Production of Documents 215
Plaintiffs' First Set of Interrogatories 224
Defendant's Response to Plaintiffs' First Set of Interrogatories and Request for Production 231

Volume II

Declaration of Karen Knutson 235
Order, Sept. 9, 2002 242
Transcript of Omnibus Motions Hearing, Oct. 17, 2002 245
Defendant's Amended Motion for Certification Pursuant to 28 U.S.C. 1292(b) and for Expedited Consideration of This Motion 279
Defendant's Response to Order of Oct. 28 282
Transcript of Motions Hearing, Oct. 31, 2002 285
Order, Nov. 1, 2002 327

Table of Contents—Continued: Page

Notice of Appeal 337
Emergency Petition for Writ of Mandamus 339
Emergency Motion for Stay Pending Appellate Review 368
Memorandum Opinion and Order, Nov. 26, 2002 383
Petition for Rehearing and Suggestion for rehearing En Banc 416
Response to Petition for Rehearing and to Suggestion for Rehearing En Banc 447

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON, DC)

Nos. 01:01-cv-01530-EGS

JUDICAL WATCH, INC., ET AL , PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP
ET AL, DEFENDANT

Filed: July 16, 2001

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
7/16/01	1	COMPLAINT against NATIONAL ENERGY POLICY DEVELOPMENT GROUP (Filing fee $150). Filed by JUDICAL WATCH, INC.,. (mjk,) (Entered: 07/25/2001)
	* * * * *	
2/15/02	24	AMENDED COMPLAINT. Filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul) (Entered: 02/15/2002)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
4/5/02	54	ORDER consolidating Civil Action No. 01-1530 (EGS) and Civil Action No. 02-631 (EGS) and ordering all future pleadings to be filed under docket number 01-1530 (EGS).Signed by Judge Emmet G. Sullivan on 4/5/2002. (lcegs2,) (Entered: 04/05/2002)
	* * * * *	
05/28/02	80	AMENDED COMPLAINT Second. Filed by JUDICAL WATCH, INC.,. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10# 11 Exhibit 11) (Orfanedes, Paul) (Entered: 05/28/2002)
	* * * * *	
7/11/02	92	MEMORANDUM OPINION. Signed by Judge Emmet G. Sullivan on 7/11/2002. (lcegs2,) (Entered: 07/11/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
7/11/02	93	ORDER. Signed by Judge Emmet G. Sullivan on 7/11/2002. (lcegs2,) (Entered: 07/11/2002)
7/19/02	94	STATUS REPORT – DISCOVERY PLAN by SIERRA CLUB. (Attachments: # 1 Exhibit A # 2 Exhibit B) (Gallagher, Patrick) (Entered: 07/19/2002)
	* * * * *	
8/2/02	101	ORDER approving plaintiffs' proposed discovery plan and scheduling Status Conference for 9/13/2002 10:00 AM in Courtroom 1. Signed by Judge Emmet G. Sullivan on 8/2/2002. (lcegs2,) (Entered: 08/02/2002)
	* * * * *	
9/3/02	120	MOTION for Protective Order by RICHARD CHENEY. (Millet, Thomas) (Entered: 09/03/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
9/3/02	121	MOTION for Protective Order Memorandum in support by RICHARD CHENEY. (Millet, Thomas) (Entered: 09/03/2002)
9/3/02	122	AFFIDAVIT re 120, 121 by Karen Knutsen by RICHARD CHENEY. (Millet, Thomas) (Entered: 09/03/2002)
		* * * * *
10/17/02	154	ORDER denying Motion for Protective Order 120, denying Motion for Protective Order 121, setting briefing schedule and hearing date for motion to stay. Signed by Judge Emmet G. Sullivan on October 17, 2002. (lcegs2) (Entered: 10/17/2002)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/02	158	MOTION to Stay Pending Appeal by Andrew Lundquist and by JOSHUA BOLTON, RICHARD CHENEY, LARRY LINDSEY, NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Paisner, Jennifer) (Entered: 10/21/2002)
10/23/02	159	MOTION for Leave to Appeal Pursuant to 28 U.S.C. sec. 1292(b) and for Expedited Consideration Of This Motion by Andrew Lundquist and by JOSHUA BOLTON, RICHARD CHENEY, LARRY LINDSEY, NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Paisner, Jennifer) (Entered: 10/23/2002)
		* * * * *
11/01/02	02	Minute Entry: Ruling held on 11/1/2002 before Emmet G. Sullivani; order to be issued electronically (Court Reporter Jackie Wood, Miller.) (clv,) (Entered: 11/01/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/7/02	181	NOTICE OF APPEAL re order of 11/1/02 [172], order of 10/17/02 135, and order of 9/9/02 154 by RICHARD CHENEY. Filing fee (government waived). counsel notified. (cdw,) Modified on 11/14/2002 (td,). (Entered: 11/12/2002)
11/13/02	182	ORDER on Defendants' Motion to Stay 158. Signed by Judge Emmet G. Sullivan on November 13, 2002. (lcegs2) (Entered: 11/13/2002)
		* * * * *
11/27/02	190	ORDER denying 159 160 Motion for Leave to Appeal pursuant to 28 U.S.C. 1292(b). Signed by Judge Emmet G. Sullivan on November 26, 2002. (lcegs2) (Entered: 11/27/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
9/30/03	199	ORDER denying without prejudice 143 Motion to Compel, denying without prejudice 144 Motion to Compel, and denying without prejudice 145 Motion to Compel, and administratively removing cases from the active calendar of the Court. Signed by Judge Emmet G. Sullivan on September 30, 2003. (lcegs2) (Entered: 09/30/2003)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON, DC)

No. 01:02-cv-0631-EGS

SIERRA CLUB, PLAINTIFF

v.

RICHARD CHENEY, VICE PRESIDENT, DEFENDANT

Filed: April 4, 2002

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/4/02	4	COMPLAINT against all defendants (Filing fee $0). Filed by SIERRA CLUB. (jeb,) (Entered: 07/26/2002)
4/5/02	2	ORDER consolidating Civil Action No. 01-1530 (EGS) and Civil Action No. 02-631 (EGS) and ordering all future pleadings in these consolidated cases to be filed under No. 01-1530.Signed by Judge Emmet G. Sullivan on 4/5/2002. (lcegs2,) (Entered: 04/05/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/7/02	6	NOTICE OF APPEAL re orders of 11/13/02 182, 10/17/02 154 and 9/9/02 135 filed in 01cv1530. Filing Fee: (government waived). (td,) (Entered: 11/14/2002)
11/27/02	7	ORDER denying defendants' motion to certify pursuant to 28 U.S.C. 1292(b). Signed by Judge Emmet G. Sullivan on November 26, 2002. (lcegs2) (Entered: 11/27/2002)
		* * * * *

UNITED STATES COURT APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 02-5355 and 02-5356

SIERRA CLUB, PLAINTIFF -APPELLEE

v.

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, DEFENDANT-APPELLANT

NATIONAL ENERGY POLICY DEVELOPMENT GROUP; ANDREW LUNDQUIST, EXECUTIVE DIRECTOR; SPENCER ABRAHAM, SECRETARY FOR DEPARTMENT OF ENERGY; DONALD L. EVANS, SECRETARY OF COMMERCE; GALE A. NORTON, SECRETARY OF INTERIOR; ANN M. VENEMAN, SECRETARY OF AGRICULTURE; JOHN W. SNOW, SECRETARY OF TREASURY; NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION; CHRISTINE TODD WHITMAN, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS -APPELLEES

JUDICIAL WATCH, INC., PLAINTIFF-APPELLEE

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANT -APPELLEE

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, DEFENDANT -APPELLANT

JOHN W. SNOW, SECRETARY OF THE TREASURY; GALE A. NORTON, SECRETARY OF THE INTERIOR; ANN M. VENEMAN, SECRETARY OF AGRICULTURE; DONALD L. EVANS, SECRETARY OF COMMERCE; NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION; SPENCER ABRAHAM, SECRETARY OF ENERGY; COLIN L. POWELL, SECRETARY OF STATE; JOSEPH M. ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY; CHRISTINE TODD WHITMAN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; PAT WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION; MITCHELL E. DANIELS, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET; JOSHUA BOLTON, ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF OF STAFF FOR POLICY; LARRY LINDSEY, ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY; JOHN D. ASHCROFT, U.S. ATTORNEY GENERAL, DEFENDANTS -APPELLEES

Filed: November 13, 2002

DOCKET ENTRIES

DATE	PROCEEDINGS
11/13/02	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Richard B. Cheney. [713654-1] (sha) [02-5356]

DATE	PROCEEDINGS
11/13/02	CLERK'S ORDER filed [713686] to consolidate cases [713686-1]. [Entry Date: 11/14/02] [02-5355, 02-5356] (sha) [02-5355 02-5356]
	* * * * *
12/6/02	PER CURIAM ORDER filed, considering the motion for stay pending appeal [713212]. It is ORDERED, on the court's own motion, that case Nos. 02-5354, 02-5355, and 02-5356 be consolidated [718152-1], It is FURTHER ORDERED, on the court's own motion, that the Clerk schedule these cases for oral argument in the normal course [718152-2]. The cases will be considered on the basis of the pleadings previously filed by the parties. It is FURTHER ORDERED, on the court's own motion, that the district court's orders under review in these actions be stayed pending further order of the court [718152-3]. The purpose of this administrative stay is to give the court sufficient opportunity to consider the merits of the case and should not be construed in any way as a ruling on the merits. [SEE THE ORDER FOR MORE DETAILS] Before Judges: Edwards, Sentelle, and Tatel. [Entry Date: 12/6/02]. [02-5354, 02-5355, 02-5356] (jth) [02-5354 02-5355 02-5356]

DATE	PROCEEDINGS
	* * * * *
4/17/03	ORAL ARGUMENT HELD before Edwards, Randolph, Tatel . [02-5354, 02-5355, 02-5356] (vew) [02-5354 02-5355 02-5356]
	* * * * *
7/8/03	JUDGMENT dismissing the petition for mandamus and granting the motions to dismiss for the reasons in the accompanying opinion. Before Judges Edwards, Randolph, Tatel. [Entry Date: 7/8/03] [02-5354, 02-5355, 02-5356] (mcm) [02-5354 02-5355 02-5356]
7/8/03	OPINION filed [758760] (20 pgs) for the Court by JudgeTatel, CONCURRING OPINION (5 pgs) filed by Judge Edwards, DISSENTING OPINION (12 pgs) filed by Judge Randolph [02-5354, 02-5355, 02-5356] (mcm) [02-5354 02-5355 02-5356]
	* * * * *

DATE	PROCEEDINGS
8/8/03	PETITION FOR REHEARING [765608-1], PETITION FOR REHEARING EN BANC [765608-2] in Nos. 02-5354, 02-5355, and 02-5356 (20 copies) filed by Petitioner /Appellants Richard Cheney, et al. (certificate of overnight mail service dated 8/8/03) [02-5354, 02-5355, 02-5356] (jth) [02-5354 02-5355 02-5356]
	* * * * *
9/10/03	PER CURIAM ORDER, En Banc, filed [771393] denying suggestion rehearing en banc [765608-2] filed by Richard B. Cheney. Before Judges Ginsburg, Edwards, Sentelle,* Henderson,** Randolph,* Rogers, Tatel, Garland, Roberts.* [Entry Date: 9/10/03] [02-5354, 02-5355, 02-5356] (*Circuit Judges Sentelle, Randolph and Roberts would grant the petition for rehearing en banc) (**Circuit Judge Henderson did not participate in this matter) (mcm) [02-5354 02-5355 02-5356]
9/10/03	PER CURIAM ORDER filed [771397] denying petition rehearing [765608-1] filed by Richard B. Cheney. (Mandate may issue or after 9/18/03) Before Judges Edwards, Randolph,* Tatel. (Circuit Judge Randolph would grant the petition

DATE	PROCEEDINGS
	for rehearing) [Entry Date: 9/10/03] [02-5354, 02-5355, 02-5356] (mcm) [02-5354 02-5355 02-5356]
	* * * * *
9/30/03	PER CURIAM ORDER (w/ attached statement) filed [775055] denying motion stay mandate [772667-1] filed by Richard B. Cheney, et al. (Mandate to issue on 10/7/03 in 02-5355, in 02-5356) Before Judges Edwards, Randolph,* Tatel. (Circuit Judge Randolph would grant the motion to stay the mandate) (A separate statement of Circuit Judge Edwards, concurring in the denial of the motion to stay the mandate, in which Circuit Judge Tatel joins, is attached) [Entry Date: 9/30/03] [02-5355, 02-5366] (mcm) [02-5355 02-5356]
	* * * * *
10/29/03	MANDATE ISSUED to Clerk, District Court [781556-1] [02-5355, 02-5356] (mcm) [02-5355 02-5356]
	* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP; THE HON. RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES; PAUL O' NEILL, SECRETARY OF THE TREASURY; GAIL NORTON, SECRETARY OF THE INTERIOR; ANN M. VENEMAN, SECRETARY OF AGRICULTURE; DONALD EVANS, SECRETARY OF COMMERCE, NORMAN MINETA, SECRETARY OF TRANSPORTATION; SPENCER ABRAHAM, SECRETARY OF ENERGY; COLIN POWELL, SECRETARY OF STATE; JOSEPH M. ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY, MANAGEMENT AGENCY; CHRISTINE TODD WHITMAN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; PATRICK H. WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY, COMMISSION; MITCHELL E. DANIELS, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET; JOSHUA BOLTON, ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF OF STAFF FOR POLICY; LARRY LINDSEY, ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY; MARK RACICOT; HALEY BARBOUR; KENNETH LAY; THOMAS KUHN; JOHN AND JANE DOE NOS. 1-99, CERTAIN UNKNOWN NON-FEDERAL EMPLOYEES, AND/OR MEMBERS OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANTS

SECOND AMENDED COMPLAINT

Plaintiff, Judicial Watch, Inc., pursuant to the Court's Order of May 23, 2002, hereby files this second

amended complaint for compliance with the Federal Advisory Committee Act, 5 U.S.C. 5 App. 2 ("FACA"), the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), and the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"). Plaintiff also seeks a writ of mandamus and a declaratory judgment pursuant to 28 U.S.C. §1361 and 28 U.S.C. §§ 2201 and 2202, respectively. As grounds therefore, Plaintiff Judicial Watch, Inc., ("JW") respectfully alleges as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1346(a)(2) (United States as defendant), 5 U.S.C. § 552(a)(4)(B) (FOIA), 28 U.S.C. §1361 (mandamus), 5 U.S.C. § 701 (APA).

2. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff, whose principal place of business is 501 School Street, SW, Suite 725, Washington, D.C. 20024, is organized as a non-profit corporation under the laws of the District of Columbia. Plaintiff undertakes educational and other programs to promote and protect the public interest in matters of public concern. To this end, Plaintiff requested certain documents pursuant to the FACA and the FOIA and intends to disseminate the requested information and documents to its supporters and benefactors, government officials, appropriate news media, and to the American public at large. The information, access, and documents Plaintiff seeks are likely to contribute significantly to the public's

understanding of the operations and activities of Defendants.

4. Defendant National Energy Policy Development Group ("NEPDG") is an agency and entity of the United States Government. Defendant NEPDG was created by President George W. Bush and headed by Vice President Richard B. Cheney to develop a national energy plan. Defendant NEPDG has its principal place of business in Washington, DC. Defendant NEPDG has possession of the information and documents to which Plaintiff seeks access.

5. Defendant Richard B. Cheney ("Cheney") is the Vice President of the United States. Defendant Cheney is the director of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

6. Defendant Paul O'Neill ("O'Neill") is Secretary of the Treasury. Defendant O'Neill is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

7. Defendant Gail Norton ("Norton") is Secretary of the Interior. Defendant Norton is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

8. Defendant Ann M. Veneman ("Veneman") is Secretary of Agriculture. Defendant Veneman is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

9. Defendant Donald Evans ("Evans") is Secretary of Commerce. Defendant Evans is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

10. Defendant Norman Mineta ("Mineta") is Secretary of Transportation. Defendant Mineta is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

11. Defendant Spencer Abraham ("Abraham") is Secretary of Energy. Defendant Abraham is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

12. Defendant Colin Powell ("Powell") is Secretary of State. Defendant Powell is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

13. Defendant Joseph M. Allbaugh ("Allbaugh") is the Director of the Federal Emergency Management Agency. Defendant Allbaugh is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

14. Christine Todd Whitman ("Whitman") is the Administrator of the Environmental Protection Agency. Defendant Whitman is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

15. Patrick H. Wood, III, ("Wood") is the Chairman of the Federal Energy Regulatory Commission. Defendant Wood is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

16. Mitchell E. Daniels, Jr., ("Daniels") is the Director of the Office of Management and Budget. Defendant Daniels is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

17. Joshua Bolton ("Bolton") is Assistant to the President and Deputy Chief of Staff for Policy. Defendant Bolton is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

18. Larry Lindsey ("Lindsey") is Assistant to the President for Economic Policy. Defendant Lindsey is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

19. Mark Racicot currently is Chairman of the Republican National Committee, 310 First Street, S.E., Washington, DC 20003 and has served as a lobbyist for Enron Corporation. On information and belief, Defendant Racicot is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

20. Haley Barbour is a lobbyist for electric utilities at Barbour, Griffith & Rodgers, 1275 Pennsylvania Avenue, N.W., Washington, DC 20004. Defendant Barbour formerly served as Chairman of the Republican National Committee. On information and belief, Defendant Barbour is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

21. Kenneth Lay is the former Chairman of Enron Corporation ("Enron"), of Houston, Texas. On information and belief, Defendant Lay is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

22. Thomas Kuhn is the President of the Edison Electric Institute, 701 Pennsylvania Avenue, N.W., Washington, DC 20004. On information and belief, Defendant Kuhn is a member of NEPDG and has

possession of the information and documents to which Plaintiff seeks access.

23. John and Jane Does Nos. 1-99 are currently unknown, non-federal employees who are members of the NEPDG and have possession of the information and documents to which Plaintiff seeks access.

STATEMENT OF FACTS

24. On January 29, 2001, President Bush established the NEPDG, whose mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local government, promote dependable, affordable, and environmentally sound promote dependable, affordable, and environmentally sound production and distribution of energy." President Bush directed the NEPDG to "gather information, deliberate, and . . . make recommendations to the President."

25. On information and belief, non-federal employees, including Thomas Kuhn, Kenneth Lay, Marc Racicot, Haley Barbour, representatives of the Clean Power Group, and other private lobbyists (John and Jane Does 1-99), regularly attended and fully participated in non-public meetings of the NEPDG as if they were members of the NEPDG, and, in fact, were members of the NEPDG.

26. Specifically, non-federal employees representing special energy interests, who donated approximately $22.5 million into the Bush-Cheney 2000 presidential election campaign, have reportedly enjoyed nearly unfettered access to and close contact with the NEPDG, Vice President Cheney, and even President Bush himself. Thomas Kuhn, a leading Bush fundraiser and president of the Edison Electric Institute, reportedly

met with Vice President Cheney. Kenneth Lay ("Lay"), the former CEO of the now bankrupt Enron and a friend of President Bush, had a dinner meeting with the President. *See* Howard Fineman and Michael Isikoff, "Big Energy at the Table," Newsweek, May 14, 2001, attached hereto as Exhibit 1 at 18.

27. In March 2001, Lay reportedly also met with Defendant Cheney to discuss energy policy. *See* Howard Fineman and Michael Isikoff, "A New Capitol Clash," Newsweek, February 11, 2002, attached as Exhibit 2. Bush administration officials subsequently admitted to five additional meetings between Enron officials and Vice President Cheney's staff in March 2001. *Id.* In addition to these six meetings in March 2001, a top aide to Defendant Cheney, Andrew Lundquist, met with members of the "Clean Power Group" —a coalition of five power companies, including Enron. *Id.*

28. In April 2001, Lay also reportedly met with Defendant Cheney to discuss the Bush Administration's response to the California energy crisis. *See* David Lazarus, "Memo Details Cheney-Enron Links," San Francisco Chronicle, January 30, 2002, attached as Exhibit 3. During this meeting, Lay reportedly handed Cheney three page memorandum urging federal authorities to refrain from imposing price caps or other measures to stabilize electricity prices. *Id.* Recommendations from this memorandum subsequently became a part of the NEPDG's proposed energy plan. *Id.*

29. On May 3, 2001, former Montana Governor Marc Racicot and former Republican Party Chairman Haley Barbour, both of whom serve or have served as lobbyists for electric utilities, attended a NEPDG meeting chaired by Vice President Cheney. *See* Michael

Weisskopf and Adam Zagorin, "Getting the Ear of Dick Cheney," Time, February 11, 2002, attached as Exhibit 4. At that time, Barbour also was involved heavily in fundrasing activities on behalf of President Bush. *Id.* Racicot currently is the Chairman of the Republican Party.

30. On May 4, 2001, David S. Addington, Counsel to Vice President Cheney, admitted in a letter to Reps. W.J. "Billy" Tauzin and Rep. John Dingell of the House Committee on Energy and Commerce, and Reps. Dan Burton and Henry Waxman of the Committee on Government Reform, that during so-called "stakeholder meetings," staff members of NEPDG held "have met with many individuals **who are not federal employees** to gather information relevant" to the NEPDG's work. *See* May 4, 2001 Letter from David S. Addington, attached as Exhibit 5 (emphasis added). All of the NEPDG so-called "stake-holder meetings" with non-governmental parties are covered by the FACA and the FOIA.

31. Vice President Cheney has been evasive in describing the staffing and operations of the NEPDG. During a July 25, 2001 on the ABC television program "Nightline," Vice President Cheney admitted that the NEPDG met with members of private organizations and/or companies regarding energy policy, but failed to identify the names of those individuals:

> [TED] KOPPEL: You've made reference to the enormous amount of experience that you bring to this job. So, I have to ask you, as someone who knows Washington as well as you do, and who knows that the one thing that drives Congress crazy, the one thing that drives the press crazy, the

one thing that is always going to be trouble is secrecy.

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: Well, why did you run your—your energy study, your energy meetings the way that you did? Why to this day haven't you revealed who participated in those meetings and what they had to tell you?

Vice Pres. CHENEY: Well, that's simply not accurate, Ted. There's been this charge that it was run in secret. But it was run the same way we do everything else with respect to policy. Same way we make economic policy or education policy. It was a group of Cabinet officials and agency heads. This is the report we produced. We published thousands of them. It has not been secret. The folks that were responsible for putting it together are all listed right up here in the front. It's the Cabinet and the agency heads. . .

KOPPEL: What about the experts that you consulted? I mean, you—you know . . .

Vice Pres. CHENEY: But we didn't—I mean, there's—there was this allegation that somehow we did what the Clintons did back in '93 on health. We did not.

KOPPEL: Exactly.

Vice Pres. CHENEY: We were very sensitive to that and very careful of it. When you. . .

KOPPEL: Tell me where the—tell me where the difference is?

Vice Pres. CHENEY: Well, the—it's when you bring in . . . KOPPEL: What was different about what you did and what Hillary Clinton . . .

Vice Pres. CHENEY: . . . outsiders and incorporate them in the policy-making process, that then certain requirements with respect to federal advisory committees kicks in and certain requirements have to be met. We didn't do that. We did this exactly the same way, for example, that we put together the economic policy or tax policy. And there's been this claim that it was done in secret, but it wasn't. It wasn't anymore secret than anything else we do.

KOPPEL: The inference that people have drawn—but, before I get to that, let me just ask you, what—what is different about what Hillary Clinton did with the health program from what you folks did with the energy policy?

Vice Pres. CHENEY: She brought in outsiders, people who were not government employees, who were not full-time. . .

KOPPEL: You didn't do that?

Vice Pres. CHENEY: No.

KOPPEL: No outsiders?

Vice Pres. CHENEY: Well, not as part of the deliberating pro—process.

KOPPEL: Well . . .

Vice Pres. CHENEY: No, that's very important.

KOPPEL: . . . are you finessing that just a little bit too finely?

Vice Pres. CHENEY: No. No, you're mis—misreading what the statute says. There's a big difference. We meet all the time behind closed doors to make economic policy or to make education policy. Now, you may deal with outside groups. They may have points of view they want to represent. We heard from energy people. We heard from many environment people. We heard from consumer groups. I met with congressman and senators and governors. We heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the president. That's the big difference.

KOPPEL: Isn't—isn't that a fine point?

Vice Pres. CHENEY: That's a very important point.

KOPPEL: In other words, if we—if we have one meeting here . . .

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: . . .with a bunch of people, and because of your background and the president's background in the energy industry yourselves . . .

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: . . . the assumption is that you did consult with a lot of your pals in the—in the energy industry. If you consult with them in this room, and then you adjourn to the next room to make policy, that—that . . .

Vice Pres. CHENEY: That's not the way it works.

KOPPEL: That satisfies the law?

Vice Pres. CHENEY: That is—that is not the way it worked. **In fact, we heard from a wide variety of different groups.** But we did not trigger the statute that specifically provides for how you deal with advisory committees, for formally constituted advisory committee that's making policy, like the Social Security Commission, for example. There's a classic example of a group of outside people, not full-time government employees, who are meeting to deliberate and to come up with a policy recommendation. They meet in open session. The press is present. You don't do that when you sit down, for example, with the—the secretary of the treasury and the Council of Economic Advisers and director of OMB to make major budget decisions, or make . . .

KOPPEL: But why not just take the wind out of the sails of all your critics and say, 'Here's a list of the people we consulted'?

See Transcript of ABC News: Nightline dated July 25, 2001, at 2-4 attached as Exhibit 6 (emphasis added).

32. On January 30, 2002, the General Accounting Office ("GAO") issued a decision concerning the NEPDG in which it specifically found that NEPDG had met with "selected non-governmental parties" in its efforts to develop a proposed national energy policy. *See* Decision of the Comptroller General Concerning NEPDG Litigation, January 30, 2002, attached as Exhibit 7.

33. The appearance of favoritism and access shown to these energy executives stands in stark contrast to the access the Bush-Cheney administration accorded to

other groups who thus far have received only a single mass meeting with lower level NEPDG staffers. *See* Exhibit 1.

34. Recent history has unfortunately seen several ethical lapses concerning conflicts of interest in The White House and violations of the FACA. In *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"), the DC Circuit remanded the case to the district court for discovery on the issue of whether the working group of the President's Task Force on National Health Care Reform constituted an advisory committee under FACA, despite sworn claims by one of the heads of the Task Force put forth by the Clinton-Gore Justice Department that it did not so qualify. In ordering this discovery to proceed, the DC circuit stated:

> We simply have insufficient material in the record to determine the character of the working group and its members . . . [A]s we have indicated, because we differ with the district court concerning the Task Force, we believe further proceedings, including expedited discovery, are necessary before the district court can confidently decide whether the working group is a FACA committee.

AAPS, 997 F. 2d at 915-916. When discovery proceeded in the district court, plaintiffs uncovered facts which conclusively showed that the working group of the Task Force did qualify as an advisory committee under the FACA. The White House was sanctioned for, in part, failing to comply with discovery requests concerning the applicability of the FACA, and for misleading the court about who was and who was not a

member of former First Lady Hillary Rodham Clinton's Health Care Task Force:

> The Department of Justice has a long tradition of setting the highest standards of conduct for all lawyers, and it is a sad day when this court must conclude, as did the United States Attorney in his investigation, that the Department of Justice succumbed to pressure from White House attorneys and others to provide this court with "strained interpretations" that were "ultimately unconvincing." This court goes further than the United States Attorney, however, because this court cannot agree that the Department of Justice never relied upon the "all-employee" exemption for the working group. Having been presented the "all-employee" facts in the Magaziner declaration, the Court of Appeals specifically found that defendants had made that argument. Neither the briefs on appeal, nor any transcript of the oral argument on appeal, was before this court. Yet the Department of Justice sat back and never told this court that it was not making, and had not made, such an argument, and never corrected any of the factual inaccuracies in the Magaziner declaration. The United States Attorney reported that this was a conscious decision because attorneys in the White House refused to allow any supplemental information to be provided to the court. It seems that some government officials never learn that the cover-up can be worse than the underlying conduct. Most shocking to this court, and deeply disappointing, is that the Department of Justice would participate in such conduct. This was not an issue of good faith word games being played with the court. The United States

Attorney found that the most controversial sentence of the Magaziner declaration—"Only federal government employees serve as members of the interdepartmental working group"—could not be prosecuted under the perjury statute because the issue of "membership" within the working group was a fuzzy one, and no generally agreed upon "membership" criteria were ever written down. Therefore, the Magaziner declaration was actually false because of the implication of the declaration that "membership" was a meaningful concept and that one could determine who was and was not a "member" of the working group. This whole dishonest explanation was provided to this court in the Magaziner declaration on March 3, 1993, and this court holds that such dishonesty is sanctionable and was not good faith dealing with the court or plaintiffs' counsel. It was not timely corrected or supplemented, and this type of conduct is reprehensible, and the government must be held accountable for it.

AAPS, 989 F. Supp. 8, 16-17 (D.D.C. 1997). In light of this history, Plaintiff believes it is particularly in the public interest for Bush-Cheney Administration officials and the NEPDG to avoid even an appearance of a possible conflict of interest, by acknowledging the application of FACA and the FOIA to all NEPDG meetings.

35. On June 25, 2001, Plaintiff sent a letter to Vice President Cheney, pursuant to the provisions of the FOIA and the FACA, 5 U.S.C. §§ 552 and App.2, requesting copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to that date, as well as a complete listing, including addresses, of all persons and entities that participated

in NEPDG meetings, either directly or indirectly through agents and/or intermediaries. *See* June 25, 2001 Letter to The Hon. Richard B. Cheney, attached as Exhibit 8. Plaintiff also sought to attend all future meetings of the NEPDG pursuant to the FACA, and asked to be provided with future meeting schedules and contact information so that representatives of Plaintiff could attend these meetings. *Id.* Plaintiff's request was denied in its entirety on July 5, 2001. *See* July 5, 2001 Letter to Larry Klayman, attached as Exhibit 9.

36. GAO the investigative arm of Congress, also requested that the NEPDG disclose the names of individuals who met with the NEPDG, but has thus far been stonewalled in its efforts. *See* Joseph Kahn, "Cheney Withholds List of Those Who Spoke to Energy Panel," The New York Times, June 26, 2001 at A17; Express Wire Services, "Cheney Won't Give Up Names," June 26, 2001; Scott Lindlaw, "Congress Demands List of Participants in Cheney Energy Meetings," AP, June 25, 2001, attached collectively as Exhibit 10. After several weeks of making requests, the GAO finally received some documents regarding Defendant NEPDG's finances, but incredibly, Defendant NEPDG has, as of May 28, 2002, failed to provide a full accounting of the individuals who met with Defendant NEPDG to the GAO, Plaintiff, or to the public.

37. Along with Plaintiff, the GAO, and various members of the media, legal commentators have advocated a broad reading of the FACA's language which on its face does appear to cover a vast number of communications between agencies and non-governmental parties. In a widely cited article on the FACA, Michael H. Cardozo reasons:

> *In principle, any group of individuals, however selected or constituted, that considers governmental matters and furnishes views and conclusions to government officials or agencies, is a governmental advisory committee.* The FACA however, is concerned only with "public advisory committees," that is groups containing at least some members who are not government employees. Thus a committee containing any number of officers of government is not covered by the Act unless its membership includes outsiders, representatives of the "private sector."

Michael H. Cardozo, "The Federal Advisory Committee Act In Operation (Administrative Law Review, Vol. 33, 3 (1981) (emphasis added). Mr. Cardozo further reasons:

> A key part of the definition of "advisory committee" is the expression "established or utilized." Superficially this means that the origin of the group is not material in determining whether it is an advisory committee covered by the act. It must be a "group," however, meaning more than one person, and someone must bring them together. That act, whether done formally or informally, "establishes" the group. However the Act does not expressly require the establishment to be performed by a government official or agency. Under the strict language of the Act, even a group formed by private industry becomes an advisory committee if it is "utilized" by the president or by one or more agencies of the government.

Id. at 12-13. (Emphasis added.) Categorizing the types of advisory committees, Mr. Cardozo writes: "A

committee in any of the five functional categories may be assigned an 'operational' as well as an 'advisory' responsibility. *Id.* at 32. Examples of the types of advisory committees include those which provide: (1) policy advice; (2) technical advice; and (3) fact finding. *Id.* at 33, 37, 39. (Emphasis added.)

38. On information and belief, the NEPDG still is in existence. In a January 3, 2002 letter to Rep. Henry Waxman, Counsel to the Vice President David Addington conceded that an unidentified member of NEPDG's staff had met with Enron representatives on October 10, 2001 and discussed energy policy matters. *See* January 3, 2002 letter from Counsel to the Vice President David Addington to Rep. Henry Waxman, attached as Exhibit 11. On information and belief, other meetings between both federal and non-federal members of the allegedly defunct NEPDG have occurred and are still occurring to this day to continue discussions on formulating a national energy policy. *Id.* Consequently, despite the alleged termination of Defendant NEPDG on September 30, 2001, Plaintiff's FACA and FOIA requests are not moot, and Plaintiff still has a right to the documents it has requested pursuant to the FACA and FOIA.

39. At a February 12, 2002 hearing in this matter, Defendants admitted that, despite the alleged termination of NEPDG, documents generated by the NEPDG are still in the custody of Defendant Cheney and that other NEPDG records "are within all of those eight agencies pertaining to the work of their agency heads, their agency heads' work on the committee." *See* Transcript of February 12, 2002 Motions Hearing at 5-6. Indeed, the Court ordered that these records be preserved. Consequently, despite the alleged termina-

tion of Defendant NEPDG, documents responsive to Plaintiff's FACA and FOIA requests obviously still exist. Plaintiff's FOIA and FACA requests are not moot, and Plaintiff still has a right to the documents it has requested pursuant to the FOIA and FACA.

COUNT I

(Violation of the Federal Advisory Committee Act)

40. Plaintiff incorporates by paragraphs 1-39 as if fully set forth herein.

41. The NEPDG is a federal advisory committee as defined under the FACA, 5 U.S.C. App. 2, and as such is required to comply with all provisions of that law, including, but not limited to, filing a charter, allowing interested persons—such as Plaintiff—to attend and have input at meetings of the NEPDG, producing documents and other things and having open meetings in accordance with the FOIA, 5 U.S.C. § 552, publishing notice of all future meetings in the federal register, and having a board that is fairly balanced in terms of the points of view represented.

42. Plaintiff has made a request to the NEPDG that representatives of Plaintiff be allowed to attend and participate in meetings of the NEPDG, that they be given copies of certain NEPDG documents, and the NEPDG appoint at least one person with a different point of view, among other matters. *See* Exhibit 8.

43. Defendant NEPDG denied Plaintiff's request by letter dated July 5, 2001. *See* Exhibit 9.

44. The failure of Defendants to comply with the FACA has harmed Plaintiff in that Plaintiff has as one of its primary functions the monitoring and safeguarding of the public trust. The activities of the

Defendants in this case have deprived Plaintiff of its right, granted by the FACA, to participate in meetings held by the NEPDG, to have advance notice of those meetings, to obtain documents generated by the NEPDG, and to have a voice in the affairs of the NEPDG. The acts of Defendants have thus frustrated Plaintiff's ability to effectively carry out its purpose of promoting and protecting justice and social welfare, including, among other things, preventing abuse and violation of the public trust by federal officers, officials, employees, agents, and/or persons acting in concert with them.

45. As an interested party and a representative of the public, Plaintiff has been and continues to be damaged by the operations of the NEPDG. Public confidence in the integrity of the Presidency and the executive branch as a whole has been and will be harmed by the appearance that the Vice President and the Bush Administration as a whole are under the influence of a select few members of major oil and other energy producing corporations, many of whom contributed heavily to the Bush-Cheney Administration in the 2000 Presidential election cycle. Members of Defendant NEPDG also gain influence or favor with the executive branch to the detriment of others who do not participate in the NEPDG.

46. Plaintiff will continue to suffer permanent and irreparable injury unless operation of the NEPDG is brought into compliance with the provisions of the FACA.

COUNT II

(Violation of the Freedom of Information Act)

47. Plaintiff incorporates paragraphs 1-46 as if fully set forth herein.

48. Plaintiff filed with Defendant on June 25, 2001 *via* facsimile and on June 26, 2001 *via* certified mail, a FOIA request (*see* Exhibit 8) in the form of a letter to Vice President Richard B. Cheney, requesting access to certain records under FOIA. Access was requested to "copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to the present, as well as a listing (including addresses) of all persons and entities that participated in NEPDG meetings, either directly or indirectly through agents and/or intermediaries," among other items.

49. By letter dated July 5, 2001, Defendant Cheney denied Plaintiff's request. *See* Exhibit 9.

50. Pursuant to 5 U.S.C. § 552(a)(6)(C) and 5 U.S.C. § 552(a)(6)(E)(ii)(I), Plaintiff shall be deemed to have exhausted its administrative remedies with respect to its request to Defendant.

51. Pursuant to 5 U.S.C. § 552(a)(3), Plaintiff has a right of access to the information and documents requested in its FOIA request, and Defendants have no legal basis for refusing to disclose this information and these documents to Plaintiff.

COUNT III

(Violation of the Federal Advisory Committee Act/Mandamus)

52. Plaintiff incorporates paragraphs 1-51 as if fully set forth herein.

53. The Cheney Energy Task Force and Task Force Sub-Groups are advisory committees as defined under FACA.

54. The defendants have violated FACA as follows:

a. By failing open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public. (Violation of FACA §10(a)(1)).

b. By failing to publish timely notice of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups in the Federal Register. (Violation of FACA §10(a)(2)).

c. By failing to allow Plaintiff and other interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and the Task Force Sub-Groups. (Violation of FACA §10(a)(3)).

d. By failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA §10(b)).

e. By failing to keep detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA §10(c)).

f. By establishing the Task Force Sub-Groups without specific authorization by statute or by the

President and without a determination published in the Federal Register, that establishing the Task Force Sub-Groups is in the public interest. (Violation of FACA §9(a)).

g. By allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by FACA (Violation of FACA §9(c)).

55. The Defendants have a nondiscretionary duty to comply with the procedural requirements of FACA including but not limited to those set forth in the preceding paragraph as items (a) through (g).

56. This Court has jurisdiction to compel the Defendants to perform a nondiscretionary duty pursuant to the Mandamus and Venue Act, 28 U.S.C. §1361.

COUNT IV

(Violation of the Federal Advisory Committee Act/Administrative Procedure Act)

57. Plaintiff incorporates paragraphs 1-56 as if fully set forth herein.

58. By violating the FACA as set forth in paragraph 54, the agency Defendants have acted arbitrarily and capriciously and not in accordance with law, and without observance of procedure required by law, in violation of 5 U.S.C. §706(2)(A) and §706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prayers for relief and judgment as follows:

1. That the Court enter a judgment declaring Defendants to be in violation of the FACA and the APA;

2. That the Court enter a writ of mandamus ordering Defendants to comply with the FACA, the FOIA, and the APA;

3. That the Court grant Plaintiff a fee waiver under the FOIA;

4. That the Court enter a permanent injunction prohibiting Defendants from convening, conducting or holding any meeting or engaging in any other activities that are not in full compliance with the FACA, the FOIA, and the APA;

5. That the Court enter a permanent injunction ordering Defendants to provide to Plaintiff, within ten working days and at no cost to Plaintiff, a full and complete copy of all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for Defendant NEPDG, irrespective of whether any such document otherwise is or could be exempt from disclosure under the FOIA;

6. That the Court enter a permanent injunction ordering Defendants to prepare and deliver to Plaintiff, within ten working days, detailed minutes of each meeting of Defendant NEPDG, certified as accurate, that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all report received, issued, or approved by Defendant NEPDG; and

7. That the Court award Plaintiff attorneys fees and its costs of suit, as well as any and all other relief the Court deems appropriate.

Respectfully submitted,

JUDICIAL WATCH, INC.

Larry Klayman, Esq.
D.C. Bar No. 334581
Suite 725
501 School Street, S.W.
Washington, DC 20024
(202) 646-5172

Attorney for Plaintiff Judicial Watch, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2002 a true and correct copy of the foregoing SECOND AMENDED COMPLAINT was served by first class mail, postage prepaid, on the following:

Counsel for Plaintiff Sierra Club:
Patrick Gallagher, Esq.
Alex Levinson, Esq.
Sierra Club
85 Second Street
San Francisco, CA 94104

Counsel for Amicus NRDC:
Howard M. Crystal, Esq.
MEYER & GLITZENSTEIN
1601 Connecticut Ave., NW
Suite 700
Washington, DC 20009

Counsel for Federal Defendants:
Anne L. Weismann, Esq.
David O. Buchholz, Esq.
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044

Counsel for Defendant Thomas Kuhn:
Robert S. Litt, Esq.
ARNOLD & PORTER
555 12th Street, NW
Washington, DC 20004-1206

Counsel for Defendant Haley Barbour:
Paul C. Rauser, Esq.
WILLIAMS & CONNOLLY
725 12th Street, NW
Washington, DC 20005

Counsel for Defendant Mark Racicot:
Richard D. Horn, Esq.
BRACEWELL & PATTERSON, LLP
2000 K Street, NW
Suite 500
Washington, DC 20006-1872

Jason Aldrich

ATTACHMENT 1

I OF I STORY

Copyright 2001 Newsweek

Newsweek

May 14, 2001, U.S. Edition

SECTION: NATIONAL AFFAIRS; Pg. 18

LENGTH: 1622 words

HEADLINE: Big Energy at the Table

BYLINE: By Howard Fineman and Michael Isikoff; With Mark Hosenball, T. Trent Gegax and Rich Thomas in Washington

HIGHLIGHT:

Winning support for your agenda is easy when your allies fill out administration's top chairs

BODY:

If you were in the oil and gas business, it was a meeting that dreams were made of. Nine days before George W. Bush was inaugurated, energy lobbyists gathered at the American Petroleum Institutets offices in downtown Washington. Their agenda: to write a wish list. One participant remembers it fondly. "The tone was, 'OK, what do you guys want? You are going to have the ear of this white House'." In came an easel and a whiteboard, and ideas flowed: looser rules for drilling on federal lands; more drilling for oil and gas in Alaska and the Gulf of Mexico; lower royalty payments for tapping offshore wells. After a while, the mood in the room grew giddy. The man from the wildcatters'

association suggested going All the Way. It was time, he said, to rethink the Endangered Species Act.

That was a wish too far. But many items on that board—and other lists scribbled by other energy lobbyists in other offices around town—found their way into the recommendations that the president will unveil to the nation next week. The API list, in fact, was forwarded to George Bush's transition team, which sent it to the Interior Department. On March 20, Interior sent many of the same ideas to the Energy Task Force that Vice President Dick Cheney had convened on Jan. 29. To close the loop, key leaders from that API meeting have since been appointed to pivotal positions in Bush's administration—among them J. Steven Griles, an energy lobbyist and the new second in command at Interior, and Thomas Sansonetti, an energy lawyer recently named the top environmental cop at the Justice Department. The two, in effect, will help administer policies they helped to write.

If the Bush administration is homecoming weekend for the energy industry, Dick Cheney's task-force report is the pregame tailgate party. Not since the rise of the railroads more than a century ago has a single industry placed so many foot soldiers at the top of a new administration. While the report will recommend an array of what one White House aide advertises as "high-tech, 21st-century conservation ideas," its core will be a call to find and use new sources of fossil fuels, as well as a renewed commitment to nuclear power. What voters need to hear "loud and clear," the president declared last week, "is that we are running out of energy in America."

Is there a national "Crisis"? California faces rolling summer-electricity Blackouts. In New York City, officials are scrambling to add small gas-fired generators to handle peak demand. Natural-gas prices have doubled in the past year. The numbers on signs at filling stations are skyrocketing, and could hit $3 a gallon this summer in the Midwest. In a West Wing interview with NEWSWEEK, Cheney shied away from the C word. "I think the potential is there for it to adversely affect the economy," he said.

But voters are using the word. In a NEWSWEEK Poll, 71 percent of those surveyed say there is an "energy crisis" in California; 53 percent agree there now is one in the country as a whole. Given an either-or choice between "protecting the environment" and "developing new sources of energy," those polled selected energy by 52 to 41 percent, compared with a 49-44 ratio just one month ago,

There's something to be said for turning to energy-industry alums in this situation—and Cheney, who like Bush is a son of the oilfields, is not shy about saying it. "The fact of the matter is you get a lot of expertise with people who have been dealing with these issues for a long time," he told NEWSWEEK. In his own case, he said, his time at Halliburton, the globe-girdling oil-services company taught him "a hell of a lot about the technology of the business," such as benign new ways to drill in Alaska's Arctic National Wildlife Refuge.

But Americans are skeptical of industry motives —and, by extension, of Bush's ties. When asked to name who had contributed "a lot" to the current energy situation, those polled named two sets of villains: the U.S. energy companies (66 percent) and overseas energy suppliers, such as OPEC. Bush himself gets his

lowest approval marks for his handling of energy and environmental issues. Democrats, naturally, are pouncing on what they see as a populist hole in Bush's armor. Late last week House Minority Leader Dick Gephardt was stumping in Chula Vista, Calif.; with transmission lines as a backdrop, he vowed to impose new federal caps on electricity rates—an idea Cheney flatly opposes.

The administration may well have raised the political risk via the process it used to draft its plan. The Bushies used a secretive, believers-only process reminiscent of another such enterprise: Hillary Rodham Clinton's effort to write a national health-care plan in 1994. Since the group comprises only government officials, White House aides say, it *is* entitled to keep its deliberations private. Still, industry leaders —who dumped $22.5 million into GOP coffers in the last election—enjoyed constant contact with the task force. Cheney met with a group of utility executives at the Edison Electric Institute, whose president, Tom Kuhn, was a leading Bush fund-raiser. No one has enjoyed better access than Enron CEO Ken Lay, who recently had dinner with his good friend the president.

The environmental community, meanwhile, got one mass meeting with the staff a month ago (and the promise of another this week with EPA Administrator Christine Todd Whitman). Efforts to meet with Cheney were rebuffed. Cheney himself confirmed he had not met with a single spokesman for the greens. That dynamic has only fueled suspicions among enviros about what's going on behind closed doors. "They're drumming up a fake energy crisis that doesn't exist," says Phil Clapp of the National Environmental Trust.

To be sure, the Cheney report will make many nods in the direction of conservation and renewable resources. Cheney confirmed that it will call for tax credits for both. The plan will herald and encourage the advent of less intrusive, high-tech means for finding and extracting oil and gas and for burning more coal. White House spinners have decided to divide the report into five parts—only two of which will deal with the extraction and the transmission of new sources of traditional types of fuel. The conservation measures will be high tech and optimistically can-do about using Yankee ingenuity to give Americans all the cars and appliances they want while using less electricity from state-of-the-art power plants. But there will be no paeans to the kind of pantywaist, tree-hugging self-abnegation the Bushies think President Carter sermonized about a generation ago. "This isn't about not bathing or turning off your lights," said a top Cheney aide. "This is about finding environmentally safe ways to make sure we have the energy we need,"

That's not enough, environmentalists say, given the rising threat of global warming the green community is convinced comes from burning fossil fuels. "The test of any energy plan will she what it does to limit greenhouse gases," says Fred Krupp of Environmental Defense. The Union of Concerned Scientists, concerned about global warming, says that renewables and conservation could displace 20 percent of traditional electricity demand by the year 2020—and greatly lessen the need for new power plants. Cheney thinks otherwise. In that span, he said, reliance on renewables could indeed triple—a "fairly optimistic" scenario but one that would still meet only 6 percent of total electricity needs. But that estimate does not include

imposing tough new mileage standards on SUVs or mandating more efficient appliances. "Part of our task," he said, "is to focus on reality, and reality is not 'Well, gee, we'll conserve our way out, we don't have to produce any more,' or 'Wind and solar will take care of it, so we don't need fossilfuels anymore'."

Now comes the hard part: selling the plan to the public and to Congress. Some GOP strategists are sanguine about overcoming environmental concerns. "Nothing like $3-a-gallon gasoline to help make the case," said one. But it's probably not that simple. White House strategists are looking for clues on how best to hawk the package in polls done for them by the Republican National Committee. The surveys show that voters know very little about where energy supplies come from or how they now are distributed in what has become a relatively deregulated marketplace. "Voters out there think that the government guarantees cheap, abundant energy," said one worried Republican polltaker, "and that's not the way it works anymore." Other insiders worry less about the Democrats than the news media, which they regard as addicted to showing videotape of belching smokestacks. "Bush will have the bully pulpit," says GOP consultant Alex Castellanos, "but it's not an easy sell."

But sell Bush must. He'll take his show on the road next week, joined by a fleet of cabinet secretaries. They will declare that action is needed after years of Clinton-administration neglect. They will say that there are no quick fixes, and tout their market-based, supply-side, long-term answers. They may use real-world vignettes about energy shortages. (on request, the Natural Gas Supply Association provided the White rouse some.) But politics is lived in the short term, and

Bush late last week suddenly found himself in the role of conservation advocate. He ordered federal facilities in California to turn up thermostats, and pledged that they would reduce electricity use by 10 percent. Cheney, the interview over, hurried to the Cabinet Room for the announcement. It turns out that conservation matters a great deal, at least in California, at least for now.

GRAPHIC PHTO: Inner circle Cheney presiding over a meeting of the Energy Task Force last week in the vice president's ceremonial office; PHOTO: The outsider: Clapp claims the Bushies may he ginning up a fake energy crisis; GRAPHIC: (Chart) Energy Advocates in the Bush Pipeline (Graphic omitted)

LOAD-DATE: May 9, 2001

ATTACHMENT 2

Newsweek

A NEW CAPITOL CLASH

Enron continues to roll Washington. Next up: a constitutional showdown

By Howard Fineman and Michael Isikoff
NEWSWEEK

Feb. 11 issue—For security reasons, George W. Bush and Dick Cheney are not supposed to spend much time together. But they made an exception last Tuesday afternoon for a hoary ritual of life in the capital: the briefing of the network anchors. Just hours before Bush's State of the Union address, Peter Jennings, Dan Rather, Tom Brokaw & Co. were ushered into the Old Family Dining Room in the private quarters of the White House to hear the president and his veep spin the speech.

ONE OF THE FIRST questions was about Enron, and Cheney's refusal to turn over logs of his energy task force's secret contacts with energy executives. "Won't this get in the way of the message of the speech?" one of the anchors asked. "Why not just give Congress the information and get it over with?" Before Cheney could answer, Bush cut in. Pounding the table, he insisted that a fundamental right of the presidency was at stake: the ability to get information and private, candid advice from anyone, any time. Bush fully backed Cheney's refusal to comply with the General Accounting Office's demand for the lists. What about the GAO's threat to file a suit? For Bush, it was a Texas Ranger moment. "Bring it on," he said.

David Walker is getting ready to do just that. The GAO chief, who now says he will sue to get the documents, insists he wasn't looking for a showdown with

Cheney. Last summer two House Democrats asked the GAO probe whether the energy task force was unfairly influenced by industry lobbyists. Walker complied, sending the White House a sharply worded "demand letter" requesting all notes and minutes of its meetings.

SCALING BACK

A plain-spoken Republican who worked in Ronald Reagan's Labor Department and later as an Arthur Andersen executive, Walker tells NEWSWEEK he concluded that the demands were too intrusive. "Out of respect for the vice president," Walker says, he "personally" scaled back the request, asking only for a list of people who advised the task force and the topics of their conversations. But Cheney sill refused. Then Enron collapsed late last year, and Walker's cause suddenly became a whole lot more interesting. "This all got Enronized," says one administration aide with a sigh. Walker, who has hired a Washington law firm to handle the case, says his investigation "isn't an Enron issue." Congress, he says, "has the right to know who from the outside is seeking to influence" White House policy. "I'm not seeking a confrontation. We just need the information."

As the trash talk between the two sides escalates–["]Talk is cheap," Walker sneers at Cheney's chin-out attitude–the case has become in part a classic Washington showdown between two powerful, bullheaded men. Yet the feud frames a wider clash between two worlds: a White House with an instinct for secrecy and Washington's Axis of Inquiry–lawyers, journalists, courts and congressional investigators. That clash will only intensify in the coming days, as former Enron CEO Ken Lay heads for the Hill and the Justice Department

proceeds with its criminal probe of the troubled energy company.

The White House has hung tough, but the administration made a limited tactical retreat as pressure increased to fully disclose its ties to Enron. Cheney acknowledged that he had personally discussed energy policy in a March 2001 meeting with Lay–and officials admitted that there were five other meetings between Enron representatives and Cheney's staff. In fact, there was at least one more. NEWSWEEK has learned that on March 29 of last year, Cheney's top energy aide, Andrew Lundquist, met with members of the Clean Power Group–a coalition funded by five power companies that included Enron. The group wanted the task force to replace some environmental rules with a plan that would allow industries to trade "pollution credit" among themselves. Enron stood to make hundreds of millions of dollars if the plan was adopted.

'WHO CARES'?

The meeting was arranged by Brad Card, the Clean Power Group's outside lobbyist and brother of White House chief of staff Andrew Card. So why didn't the White House disclose the meeting in its list of Enron contacts? A White House aide says Lundquist "has no recollection" of being told that Enron was part of the group. (Brad Card's associate Mark Irion tells NEWSWEEK he made clear to Lundquist at the outset that Enron was a member.) Cheney spokeswoman Mary Matalin says its doesn't matter, since the proposal never made it into the energy plan. "Who cares if there were a hundred meetings?" she says. The Justice Department might. On Friday, Justice officials ordered the administration to preserve all documents related "in any way" to Enron.

Democrats, and even some Republicans, on the Hill are standing shoulder to shoulder with Walker's demands for still more disclosure. Their argument: when the White House or government agencies make policy, they are supposed to use a procedure that guarantees public access to keep officials from being secretly influenced by private–so-called ex parte–conversations.

The White House insists that all meetings of the task force are exempt from this kind of disclosure. Why? Because Cheney–a "constitutional officer" as vice president–is exempt, and therefore, they say, so is the task force he ran. White House aides say they designed the task force to avoid the problems that Hillary Clinton's health-care group faced in 1994. To insulate the group within the constitutional limits, aides say, Cheney himself chaired it, only government officials served on it and only task-force members–not the whole group–met with industry lobbyists. Critics complain that's a loophole big enough to drive an oil rig through.

Bush and Cheney are unimpressed. For years Cheney has loudly lamented the steady erosion of presidential power at the hands of Congress and the press. And Bush is the son of a CIA director and third-generation Skull and Bones man: a kid to secrets born. The Cheney-Bush kinship has been strengthened by the war on terror, with its emphasis on sealed lips. "It's a horse race between them," says a top White House aide, "to see who can take a tougher stand."

The president's political advisers aren't nearly so confident. For months GOP strategists have been urging the White House to ease up or risk looking as if it has something to hide. "If we released everything, we would look better," admits one Bush aide. But in his

increasingly tense stare-down with Walker, Cheney isn't about to be the one who blinks first.

With Martha Brant and Tamara Lipper

© *2002 Newsweek, Inc.*

ATTACHMENT 3

THE ENRON COLLAPSE
Memo details Cheney-Enron links

THE ENRON COLLAPSE
Memo details Cheney-Enron links
Company's suggestions resembled elements of the administration's energy policy
David Lazarus, chronicle Staff Writer
Wednesday, January 30, 2002
2002 San Francisco Chronicle

URL: http://www.sfgate.com/egi-bin/article.ccgi?file=/chronicle/archive/2002/01/30/MN46204.DTL

MEMO

While the White House insists that details of its talks with Enron officials remain secret, a memo outlining those discussions reveals the extent to which the Houston energy giant lobbied to influence government policy.

The memo, a copy of which was obtained by The Chronicle, was handed by former Enron Chairman Ken Lay to Vice President Dick Cheney last April when the two met to discuss the administration's response to California's energy crisis.

The White House acknowledged last night that aspects of the memo resembled elements of Cheney's energy plan, but it refused to say whether the document was

included in notes that Cheney now refuses to divulge to congressional investigators.

The General Accounting Office is threatening to sue the administration if it doesn't disclose. details of its talks with Enron officials.

The three-page document contains eight points spelling out Enron's case for why federal authorities should refrain from imposing price caps or other measures sought by California officials to stabilize runaway electricity prices.

A number of the positions in the memo subsequently made it into Cheney's energy plan or were reflected in comments by senior administration officials.

"Events in California and in other parts of the country demonstrated that the benefits of competition have yet to be realized and have not yet reached consumers," the memo argues.

"The following actions need to be taken," it continues, outlining positions on a series of matters. Some of the topics, such as equal access to transmission grids and interconnection of power networks, are largely technical in nature.

ENRON FROWNED ON PRICE CAPS

The key point as far as California was concerned was whether soaring wholesale power prices should be limited or whether such prices were merely a reflection of normal supply-and-demand dynamics.

"The administration should reject any attempt to re-regulate wholesale power markets by adopting price caps or returning to archaic methods of determining the cost-base of wholesale power," the memo says.

It adds that even temporary price restrictions "will be detrimental to power markets and will discourage private investment."

The memo blames California officials for having made only "limited progress" in tackling the state's power woes. It says that if the administration were to follow all of Enron's recommendations, the measures "would mitigate this crisis."

An Enron spokesman confirmed that the memo had been given by Lay to Cheney during their one-on-one talks.

Mary Matalin, an adviser to the vice president, said Cheney's energy plan included input from many sources. "Just because some of the things (in the memo) are included in the plan doesn't mean they were from the talks" between Cheney and Lay, she said.

LIMITS CALLED 'A MISTAKE'

Still,, as far as price caps go, the administration was quick to fall into lockstep with Enron's opposition to any federal regulatory moves. "We think that's a mistake," Cheney said just weeks after his meeting with Lay.

Nevertheless, federal regulators finally imposed price limits in June based on the cost of the least-efficient, and thus most expensive, generating plant. Democrats in Washington had threatened to act on their own if the regulators did not come up with a remedy for California's troubles.

Cheney also echoed Enron's position on the culpability of California's leaders in exacerbating the state's energy problems.

"When the problem became obvious last year, over a year ago, they didn't respond," he said in May.

Noting that California had experienced rolling blackouts and the bankruptcy of its biggest utility, he also said, "I don't think that's a sterling record of leadership, I would guess, on their part."

SHARED FAITH IN DEREGULATION

To be sure, Cheney, Lay and President Bush, as well as other industry players, shared a belief in deregulation well before the lights went out in California. But the memo underscores the broad kinship between Enron and the administration in drafting official policy.

Steve Maviglio, a spokesman for Gov. Gray Davis, said it came as no surprise that Enron had substantial clout in formation of the Bush administration's stance on California's difficulties.

"What the federal government did during the energy crisis was pretend that the problem didn't exist and say that the markets can solve everything, and that's the same thing Ken Lay told the governor," Maviglio said.

He added that "the administration was espousing what Enron was espousing—that the markets should fix themselves."

Whatever else, it's extraordinary for a private company, particularly one accused by California officials of having gouged the state with wildly inflated energy prices, to have played such a prominent role in the White House's response to the crisis.

'CONSUMERS SHOULD BE OUTRAGED'

"If the administration was allowing Enron to guide its policy during the California energy crisis, consumers should be outraged," said Janee Briesemeister, senior policy analyst at Consumers Union in Austin, Texas.

"It's not unusual for a company to hand policymakers their ideas for what should be done," she added. "Things break down when policymakers reffuse to admit that they used what was brought to them by industry."

Cheney's argument, as he told an interviewer Sunday, is that revealing details of his talks with Enron would undermine "the ability of the president and the vice president to solicit advice from anybody they want in confidence."

Bush echoed this sentiment a day later, saying that confidential talks are necessary to "get good, sound opinions." He reiterated that stance yesterday in a meeting with congressional leaders.

Craig McDonald, director of Texans for Public Justice, a watchdog group, called it laughable for the administration to cast its secrecy as a defense of high-minded principle.

"All they're fighting for is to keep the wraps on how much clout Enron had over Dick Cheney's energy plan," he said.

©2002 San Francisco Chronicle

SF Gate: Multimedia (image)

THE ENRON COLLAPSE / Memo details Cheney-Enron links / Company's suggestions resembled elements of the administration's energy policy This memo was given to Vice President Dick Cheney by Enron's then-CEO Ken Lay last April. It spells out Enron's case for why federal authorities should refrain from imposing price caps or other measures sought by California officials to stabilize runaway electricity prices. Image File: 270 Kbytes

National Energy Policy: Priorities

The 1992 Energy Policy Act (EPA) intended to introduce competition into the wholesale market for electric power by providing transmission access. Events in California and in other parts of the country demonstrated that the benefits of competition have yet to be realized and have not yet reached consumers. To realize the vision set forth in the EPA the following actions need to be taken:

1. **Fair Transmission Access**

ln Order No. 888, the FERC attempted to formulate fair terms and conditions of access to the transmission grid for all users. How ever, the FERC failed to extend its jurisdiction to transmission services bundled together with retail sales. Consequently, distinct rules apply to different parties for use of the *same* transmission asset and such rules provide vertically integrated utilities the opportunity to use their transmission assets to disadvantage independent third party generators and wholesalers.

To achieve robust competition in wholesale power markets, the FERC must actively exercise jurisdiction over all aspects of electricity transmission in inerstate commerce and place all uses of the grid under the same rates, terms, and conditions. Moreover, FERC jurisdiction must extend to the terms of access applicable to transmission systems owned and operated by non-FERC jurisdictional entities including Federal Power Marketing Associations (PMAs), states and municipalities.

To improve reliability, the FERC has encouraged utilities to combine transmission facilities into large regional Transmission Organizations (RTOs) and to assign the responsibility for operating RTOs to an indepenent management team. Properly structured RTOs can ease the movement of power between states and between users within a state, and will enhance reliability, commercial activities, and competition in the energy industry.

However, the FERC has refused to make RTO participation mandatory. This, coupled with the lack of non-discriminatory open access terms, has weakened the RTO initiative. Therefore, the Administration must encourage the FERC to approve only those RTOs with sufficient size and scope and with non-discriminatory terms and conditions for access and to require that all transmission owners participate in an RTO. Finally, the Administration should revise those tax provisions that prevent the transfer of assets to new, stand alone independent, for profit transmission companies (Transcos).

2. Independent Energy Reliability Organizations

Governance of the North America Electric Reliability Council (NERC) is cumbersome and places new market entrants at a competitive disadvantage. There is a necessary role for FERC oversight of a new Independent Reliability Organization (IRO).

Legislation to establish a new IRO is required. However, the "consensus" reliability language in the proposed Murkowski bill is ineffective since it establishes an unsatisfactory procedure to resolve conflicts between the IRO and the various RTOs established by the FERC.

Legislation that permits the FERC to delegate authority to develop reliability standards and enforce standards, establishes an appropriate funding mechanism, includes a limited States' savings clause and provides the IRO participants with anti-trust immunity will accomplish the shared goal of establishing an effective IRO.

3. Wholesale Market Price Caps or Cost-Based Wholesale Rates

The Administration should reject any attempt to re-regulate wholesale power markets by adopting price caps or returning to archaic methods of determining the cost-base of wholesale power. Price caps, even if imposed on a temporary basis, will be detrimental to power markets and will discourage private investment by significantly raising political risk. Similarly, a return to cost-based wholesale rates will be extremely difficult to implement and will effectively negate significant investments made by

new market entrants made in reliance on the presence of deregulated wholesale power markets.

4. Interconnection Policy

Competitive generation (including Distributed Generation "DG") and wholesale power markets have been hindered by grid interconnection policies and procedures that restrict new entry. The lack of a uniform and effective interconnection policy creates uncertainty, delay and unnecessary costs in development of new generation capacity and standardized, non-discriminatory interconnection procedures.

5. Federal Transmission and Generation Siting Policy

An efficient and reliable interstate wholesale market requires construction of new transmission and generation facilities. Siting and permitting problems have frustrated construction of new facilities. Consistent with rules for certification of natural gas facilities, granting condemnation rights to private parties that have obtained federal authorization to construct facilities can significantly reduce these problems. In addition, Federal Agencies and Tribunal Governments should streamline the regulatory processes to enable expedited construction and efficient operation of energy infrastructure.

6. Demand Reduction Incentives

The Administration should mandate the creation of a regional demand exchange (implemented by mandatory RTOs) that would allow large consumers to

post bids for the reduction of demand. If implemented expeditiously, such a mechanism can have an immediate impact in reducing demand this summer.

7. California Power Crisis

The political leadership in California has made limited progress in solving its power crisis. All of the above items would mitigate this crisis.

8. Natural Gas Supply Outlook

There are concerns that natural gas supplies may not be adequate to meet market demand. Yet all studies indicate that remaining economically recoverable resources in North America are ample for decades to come. These supplies can be further supplemented by imported liquified natural gas. This will allow natural gas to continue to provide an increasing share of the total energy needs to the U.S.

ATTACHMENT 4

Time, February 11, 2002

Copyright 2002 Time Inc.

Time

HEADLINE Getting The Ear Of Dick Cheney

BYLINE Michael Weisskopf and Adam Zagorin

Dick Cheney has taken a hard line against the General Accounting Office, refusing its efforts to get information on meetings held by his energy task force. Critics suspect that Cheney is stonewalling to conceal the Administration's links with bankrupt energy giant Enron. But Cheney may be hiding more than that. Several other energy companies had opportunities to influence the Administration's energy policy, with both persuasion and money. A key task-force meeting, sources tell TIME, was held by Cheney in the White House on May 3. Among attendees were two lobbyists for electric utilities: former Montana Governor and now G.O.P. chairman Marc Racicot and former G.O.P. Chairman Haley Barbour. Two weeks later, Cheney's report gave the lobbyists much of what they wanted, including a re-evaluation of a costly clean-air rule, called the new-source review, which requires new pollution controls when power plants are expanded. While he was lobbying for these energy interests, Barbour was also raising at least $ 250,000 for a May 21 G.O.P. gala honoring President Bush. The group of utilities Barbour was representing, led by Southern Co., gave $ 150,000 to the event. The night before the gala, Cheney held a glitzy reception at the vice presidential mansion for hundreds of the fete's sponsors and longtime party donors.

Another company that had entree to the Cheney task force was Peabody Energy, a coal behemoth whose

holding company and top officer have given nearly $ 200,000 to the President and his party since Bush took office, including $ 25,000 for the May gala. Sources say Peabody chairman Irl Engelhardt and other energy executives met in March with two task-force members, Energy Secretary Spencer Abraham and Bush economic adviser Larry Lindsey. Cheney's group also heard in March from officials from the nuclear-energy industry—whose trade association, the Nuclear Energy Institute, contributed $ 100,000 to the Bush event. Both coal and nuclear power got major endorsements in the task-force report.

Racicot, who stopped lobbying after taking over the G.O.P. last month, said he didn't raise funds for the Bush bash. Barbour did not return calls for comment. Cheney spokeswoman Mary Matalin denied any link between task-force access and fund raising, saying the Veep had no idea who was financing the gala.

—By Michael Weisskopf and Adam Zagorin

ATTACHMENT 5

OFFICE OF THE VICE PRESIDENT

WASHINGTON

May 4, 2001

The Honorable W.J. "Billy" Tauzin, Chairman
The Honorable John D. Dingell, Ranking Minority Member
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

The Honorable Dan Burton, Chairman
The Honorable Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
House of Representatives
Washington, DC 20515

Gentlemen:

This is in response to the letter of April 19, 2001 from the ranking minority members of your Committee to Mr. Andrew Lundquist, Executive Director of the National Energy Policy Development Group (NEPDG). The letter sought information regarding compliance with the Federal Advisory Committee Act (FACA) (5 U.S.C. Appx. 2) by the NEPDG. Please be advised that the FACA does not apply to the NEPDG, noting especially that FACA by its own terms does not apply to a group "composed wholly of full-time, or permanent

part-time, officers or employees of the Federal Government."

As a matter of comity between the legislative and executive branches, with due regard for the constitutional separation of power and the rights of Americans to petition their government, and reserving all legal authorities and privileges that may apply, we are pleased to provide the enclosed information, which will enable you to conclude independently that the establishment and activities of the NEPDG are not inconsistent with the FACA.

Sincerely,

/s/ DAVID S. ADDINGTON
DAVID S. ADDINGTON
Counsel to the Vice President

Enclosure as stated.

RESPONSES OF ANDREW LUNDQUIST, EXECUTIVE DIRECTOR FOR THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP TO QUESTIONS FROM THE RANKING MINORITY MEMBERS OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM AND THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

COMMITTEE QUESTION (1): (1) It is our understanding that you are directing a task force charged with examining and formulating energy policy.

RESPONSE (1): The mission of the National Energy Policy Development Group established on January 29, 2001 is to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. To carry out that mission, the Group gathers information, deliberates and makes recommendations to the President. Ultimately, the Group is to report its recommended national energy policy to the President.

COMMITTEE QUESTION (1)(a): (a) Please provide a complete list of task force members and staff assigned to the task force, identifying the employer of the member or staff. In the case of federal employees, please identify the department or agency for which the member or staff works.

RESPONSE (1)(a): The National Energy Policy Development Group consists of the following officers of the Federal Government: the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary

of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs. The Vice President may invite the Chairman of the Federal Energy Regulatory Commission to participate. The Vice President may invite the participation of the Secretary of State when the work of the Group involves international affairs and, as appropriate, other officers of the Federal government. The Vice President has invited the Director of the Office of Management and Budget to participate. The Vice President presides at the meetings of the Group and directs its work. The Group is supported by five professionals employed by the Department of Energy and assigned for this purpose to the Office of the Vice President: an Executive Director, a Deputy Director, two Senior Professional Staff Members, and a Professional Staff Member.In addition, an individual appointed as a White House Fellow who is assigned to the Office of the Vice President provides support to the Group.

COMMITTEE QUESTION (1)(b): (b) Please identify any task force members and staff who are not full-time federal employees. In the case of any member or staff who is a part-time federal employee, identify the hours per week that person works for the federal government and when that person began working for the federal government.

RESPONSE (1)(b): The National Energy Policy Development Group consists solely of officers of the Federal Government. The six individuals identified

in Response (1)(a) above who provide support to the Group (hereafter "Group support staff") are all full-time Federal employees. For brief periods the employment status of two of the six individuals (from February 1 through 12, 2001 in the case of the Executive Director, and from February 7 through 12, 2001 in the case of the Deputy Director) was as consultants to the Department of Energy while the Department was processing their entrance-on-duty papers; they had no employer other than the Department of Energy during those brief periods. Please note that the Government officers who are on the departments and agencies who help them with review and drafting of materials and may attend Group meetings with them. Those departments and agencies could advise on the personnel status of those assistants if it were material.

COMMITTEE QUESTION(1)(c): (c) Please identify any task force member or staff who, at the time of any task force meeting, was serving as a contractor to, or temporary full time employee of, the federal government while on leave from non-federal employment. For each member or staff identified, please include the name of that person's non-federal employer.

RESPONSE (1)(c): None of the government officers who compose the National Energy Policy Development Group, nor any of the individuals on the Group's support staff, was at the time of any Group meeting, serving as a contractor to, or temporary full time employee of, the federal government while on leave from non-federal employment.

COMMITTEE QUESTION (2): (2) It is our understanding that the task force has conducted a series of

"stakeholder meetings" on energy policy and legislation at federal facilities over the past few months.

RESPONSE (2): The National Energy Policy Development Group has not held such meetings, Individuals on the Group support staff have met with many individuals who are not Federal employees to gather information relevant to the Group's work, but such meetings do not involve deliberations or any effort to achieve consensus on advice or recommendations. These meetings by the Group's staff were simply forums to collect individual views rather than to bring a collective judgment to bear. The Group's staff held such meetings with a broad representation of people potentially affected by the Group's work, including individuals involved with companies or industries (e.g., in the electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline railroad and automobile manufacturing sectors); environmental, wildlife, and marine advocacy, State and local utility regulation and energy management, research and teaching at universities; research and analysis at policy organizations (i.e., think-tanks); energy consumers, including consumption by businesses and individuals; a major labor union; and about three dozen Members of Congress or their staffs.

COMMITTEE QUESTION (2)(a): (a) Please provide a list of all task force meetings held, including the date and location of each meeting.

RESPONSE (2)(a): The Vice President has convened the National Energy Policy Development Group on the following dates in the year 2001, and all such meetings have been in the White House Complex: January 29, February 9 and 16, March 12 and 19, April 3, 11, and 18, and May 2.

COMMITTEE QUESTION (2)(b): (b) Please describe in detail the purpose of these meetings. For each meeting, please explain if the meeting was conducted in order to obtain advice or recommendations about policy or proposed legislation. Please explain whether each meeting had a fixed agenda and/or a defined purpose.

RESPONSE (2)(b): The National Energy Policy Development Group, consisting only of Government officers, has met at each of its meetings for the purpose carrying out its mission to develop a national energy policy designed to help the private sector, and necessary and appropriate Federal, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. At those meetings, to carry out its assigned mission, the Group has reviewed relevant information, deliberated, and formulated potential recommendations. With regard to meetings with individuals involving the Group's support staff, please see Response (2).

COMMITTEE QUESTION (2)(c): (c) Please describe the outcome of each meeting. Please explain to what extent each meeting resulted in the formulation of specific proposals or recommendations. Please specify to what extent the task force incorporated or adopted any suggestions of advice received at each meeting from non-federal "stakeholders", or to what extent it modified its proposals based on input received from non-federal "stakeholders" at the meeting.

RESPONSE (2)(c): Each of the National Energy Policy Development Group's meetings to date have

advanced its mission as set forth in Response (1). Each of the meetings of the Group's support staff described in Response (2) gathered, in support of the Group's mission, information relevant to the Group's work.

COMMITTEE QUESTION (2)(d): (d) For each task that has occurred to date, please provide a complete accounting of all attendees. Please include the name and employer of each attendee as well as the name of all clients represented by each person for the purpose of any particular task force meeting. Please indicate if any participants received any compensation for their involvement in a meeting or meetings.

RESPONSE (2)(d): The officers of the Government constituting the National Energy Policy Development Group attended the Group's meetings. The Group's support staff attended the Group's meetings. Other employees on the staff of the Vice President attended the Group's meetings. The Government officers who constitute the National Energy Policy Development Group have assistants at their departments and agencies who attended the Group's meetings with them.

COMMITTEE QUESTION (3): (3) The Federal Advisory Committee Act (FACA) defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal government . . ." The Act requires that the meetings of such advisory committees be noticed in

advance, open to the general public, and on the record, except under certain limited circumstances.

RESPONSE (3): Section 3(2) of the FACA provides that the term "advisory committee" as used in the FACA excludes "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." The National Energy Policy Development Group is composed wholly of full-time officers of the Federal Government. Accordingly, the FACA requirements to which Committee Questions (3)(a) through (3)(f) refer do not apply. See also Response (2).

COMMITTEE QUESTION (3)(a): (a) Was advance notice of these task force meetings provided to the general public?

RESPONSE (3)(a): See Response (3).

COMMITTEE QUESTION (3)(b): (b) How many of these task force meetings took place on federal property or involved the attendance of federal personnel?

RESPONSE (3)(b): See Response (3).

COMMITTEE QUESTION (3)(c): (c) Were these meetings open to the general public?

RESPONSE (3)(c): See Response (3).

COMMITTEE QUESTION (3)(d): (d) If these meetings were not open to the general public, why not and under what authority?

RESPONSE (3)(d): See Response (3).

COMMITTEE QUESTION (3)(e): (e) Were any transcripts or detailed minutes of these meetings kept by you or any other attendee or participant?

RESPONSE (3)(e) : See Response (3).

COMMITTEE QUESTION (3)(f): (f) If no transcripts or minutes were kept, please explain why not and under what authority?

RESPONSE (3)(f): See Response (3).

COMMITTEE QUESTION (4): (4) As stated previously, we have been informed that only certain "stakeholders" were invited to participate in these meetings.

RESPONSE (4): The National Energy Policy Development Group has not held such meetings. To support the Group in the performance of its mission, one or more of the individuals on the Group's support staff have met with many individuals who are not Federal employees to gather from them information relevant to the Group's work. The non-Federal employees from whom the Group's support staff has thus far sought information constitute a broad range of sources of information; see Response (2).

COMMITTEE QUESTION (4)(a): (a) Was any executive branch agency or any of its personnel responsible in any way for determining who would or would not be invited to participate in these meetings?

RESPONSE (4)(a): See Response (4).

COMMITTEE QUESTION (4)(b) : (b) Please provide a detailed explanation of the process by which each non-federal participant in these meetings was determine to be a "stakeholder" in energy policy.

RESPONSE (4)(b): See Response (4).

COMMITTEE QUESTION (4)(c): (c) Please provide a detailed explanation of the process by which the task force decided not to meet with any private citizens or groups.

RESPONSE (4)(c): See Response (4).

COMMITTEE QUESTION (4)(d): (d) Was the governor of any state invited to participate in these meeting? If so, which? If not, why not?

RESPONSE (4)(d): See Response (4).

COMMITTEE QUESTION (4)(e): (e) Were any state public utility commissioners invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(e): See Response (4).

COMMITTEE QUESTION (4)(f): (f) Were any representatives of organized labor invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(f): (f) See Response (4).

COMMITTEE QUESTION (4)(g): (g) Were any representatives of consumer advocacy groups invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(g): See Response (4).

COMMITTEE QUESTION 4(h): (h) Was the National Federation of Independent Businesses or any other small business representative invited to participate in these meetings? If not, why not?

RESPONSE (4)(h): See Response (4).

COMMITTEE QUESTION 4(i): (i) Did the Department of Energy notify any Member of Congress about the task force's meetings prior to the first meeting or invite any Member of congressional staff to attend any of the "stakeholder" meetings?

RESPONSE (4)(i): To the best of my knowledge, no such notifications or invitations by the Department

of Energy occurred with regard to any Group support staff meetings with non-Federal employees, nor would the Department of Energy have had a role with regard to such meetings that would have called for the Department of Energy to make such notifications or invitations.

/s/ ANDREW LUNDQUIST Date: 5/4/01
ANDREW LUNDQUIST,
Executive Director
National Energy Policy
Development Group

ATTACHMENT 6

Search - 75 Results – nightline vice president cheney

Source: *All Sources* > News > Transcripts
Terms: nightline vice president cheney *(Edit Search.)*

Select for FOCUS™ or Delivery

ABC News -July 25, 2001 Wednesday

Copyright 2001 Burrelle's Information Services
ABC News

SHOW: ABC News: **Nightline** (11:35 PM AM ET) - ABC

July 25, 2001 Wednesday

TYPE: Interview

LENGTH: 4176 words

HEADLINE: A Conversation With Dick **Cheney**, **Cheney** discusses his first six months in office

ANCHORS: TED KOPPEL

BODY:
Announcer: July 25th, 2001.

Vice President DICK CHENEY: (From file footage) That I will support and defend the Constitution of the United States.

TED KOPPEL, host:

It's been six months since he became **Vice President** of the United States.

Vice Pres. **CHENEY**: And my doctors tell me that I'm not—not up to the task, I'd be the first one to hang it up. The idea that any member of Congress can demand

from me a list of everybody I meet with—there's been this claim it was done in secret, but it wasn't.

KOPPEL: I'm reminded of what one of your predecessors once famously said about the office of the vice presidency not being worth a bucket of warm spit. Only, I don't think he . . .

Vice Pres. CHENEY: I think you cleaned it up.

KOPPEL: . . . used the word spit.

Tonight, A Conversation With Dick **Cheney**.

Announcer: From ABC News, this is **NIGHTLINE**. Reporting tonight from the White House, Ted Koppel.

KOPPEL: Congressman, White House chief of staff, secretary of defense and, for the past six months, **Vice President** of the United States, Dick **Cheney** is a substantive man in what over the years has sometimes been a largely ceremonial job. If anything, **Vice President Cheney** is occasionally given too much credit when it comes to doing the heavy lifting in this administration. That has focused an extraordinary amount of attention on his health. Is he doing too much? What would happen if he couldn't continue in the job? Tonight he will talk about his health and the public's appetite to know about it in some detail. He will also answer charges that he and other members of the Bush administration wrap the same cloak of secrecy around the creation of their energy policy that Hillary Clinton once used while formulating a new health plan. He doesn't buy the analogy. He'll explain why.

Dick **Cheney** is the man who once rallied Republican supporters by pointing to what he said was an underfunded US military, and promising that help is on the way. Now it is the joint Chiefs and some senior

civilians at the Pentagon complaining about what's in the Bush/**Cheney** military budget. The **Vice President** will talk about a major change in US military strategy. No longer will the United States have the ability to fight two simultaneous wars. All of that and more in a wide-ranging interview with **Vice President Cheney,** conducted earlier today at the executive office building right next to the White House.

You talk about the pros and cons. In other words, the—the—the vice presidency is said to be an enormously frustrating job because you're not the boss.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: This president has given you a lot of authority, given you a lot of power. Talk about the good and the bad.

Vice Pres. **CHENEY:** Well, I—I find it to be virtually all good. I never planned to come back to government. This is my fifth tour, my third time in the White House, and I really thought I'd completed my time in government. And to have the opportunity to come back now at my stage in life, 60 years old, and get to do it one more time, sort of correct all those mistakes you made earlier in your career, is really a . . . (unintelligible).

KOPPEL: Making policy.

Vice Pres. **CHENEY:** And a chance to pol—participate in a policy-making process, he has given me a lot of responsibility. We function very much as a team, which is exactly what he said he wanted when I signed on.

KOPPEL: You've made reference to the enormous amount of experience that you bring to this job. So, I have to ask you, as someone who knows Washington as well as you do, and who knows that the one thing that

drives Congress crazy, the one thing that drives the press crazy, the one thing that is always going to be trouble is secrecy.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: Well, why did you run your—your energy study, your energy meetings the way that you did? Why to this day haven't you revealed who participated in those meetings and what they had to tell you?

Vice Pres. **CHENEY:** Well, that's simply not accurate, Ted. There's been this charge that it was run in secret. But it was run the same way we do everything else with respect to policy. Same way we make economic policy or education policy. It was a group of Cabinet officials and agency heads. This is the report we produced. We published thousands of them. It has not been secret. The folks that were responsible for putting it together are all listed right up here in the front. It's the Cabinet and the agency heads . . .

KOPPEL: What about the experts that you consulted? I mean, you—you know . . .

Vice Pres. **CHENEY:** But we didn't—I mean, there's—there was this allegation that somehow we did what the Clintons did back in '93 on health. We did not.

KOPPEL: Exactly.

Vice Pres. **CHENEY:** We were very sensitive to that and very careful of it. When you . . .

KOPPEL: Tell me where the—tell me where the difference is?

Vice Pres. **CHENEY:** Well, the—it's when you bring in . . .

KOPPEL: What was different about what you did and what Hillary Clinton . . .

Vice Pres. **CHENEY:** . . . outsiders and incorporate them in the policy-making process, that then certain requirements with respect to federal advisory committees kicks in and certain requirements have to be met. We didn't do that. We did this exactly the same way, for example, that we put together the economic policy or tax policy. And there's been this claim that it was done in secret, but it wasn't. It wasn't anymore secret than anything else we do.

KOPPEL: The inference that people have drawn—but, before I get to that, let me just ask you, what—what is different about what Hillary Clinton did with the health program from what you folks did with the energy policy?

Vice Pres. **CHENEY:** She brought in outsiders, people who were not government employees, who were not full-time . . .

KOPPEL: You didn't do that?

Vice Pres. **CHENEY:** No.

KOPPEL: No outsiders?

Vice Pres. **CHENEY:** Well, not as part of the deliberating pro—process.

KOPPEL: Well . . .

Vice Pres. **CHENEY:** No, that's very important.

KOPPEL: . . . are you finessing that just a little bit too finely?

Vice Pres. **CHENEY:** No. No, you're mis—misreading what the statute says. There's a big difference. We meet all the time behind closed doors to make economic

policy or to make education policy. Now, you may deal with outside groups. They may have points of view they want to represent. We heard from energy people. We heard from many environment people. We heard from consumer groups. I met with congressman and senators and governors. We heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the president. That's the big difference.

KOPPEL: Isn't—isn't that a fine point?

Vice Pres. **CHENEY:** That's a very important point.

KOPPEL: In other words, if we—if we have one meeting here . . .

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: . . . with a bunch of people, and because of your background and the president's background in the energy industry yourselves . . .

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: . . . the assumption is that you did consult with a lot of your pals in the—in the energy industry. If you consult with them in this room, and then you adjourn to the next room to make policy, that—that . . .

Vice Pres. **CHENEY:** That's not the way it works.

KOPPEL: That satisfies the law?

Vice Pres. **CHENEY:** That is—that is not the way it worked. In fact, we heard from a wide variety of different groups. But we did not trigger the statute that specifically provides for how you deal with advisory committees, for formally constituted advisory

committee that's making policy, like the Social Security Commission, for example. There's a classic example of a group of outside people, not full-time government employees, who are meeting to deliberate and to come up with a policy recommendation. They meet in open session. The press is present. You don't do that when you sit down, for example, with the—the secretary of the treasury and the Council of Economic Advisers and director of OMB to make major budget decisions or make . . .

KOPPEL: But why not just take the wind out of the sails of all your critics and say, 'Here's a list of the people we consulted'?

Vice Pres. **CHENEY:** Well, there's—there's an—there isn't anybody we met with there that would be at all surprising. But there's an important principle here, I think, Ted, and that's the fact that what we have is a request from a congressman for a list of all the people we met with, not just in terms of the energy or everybody I met with, for example, during that period of time, as well as what they talked to me about. In effect, what we're saying here, if in fact we were to respond to that request, is that any member of Congress can demand to know who I meet with, what I talk to them about on a daily basis. I would have no ability to meet with anybody in confidence.

KOPPEL: So, on a—on a matter of principle then you are not going to—you're not going to reveal that list.

Vice Pres. **CHENEY:** I think it's going to have to be resolved in court, and I think that's perfectly appropriate. I think, in fact, this is the first time the GAO has ever issued a so called demand letter to a president/**vice president**. I'm a duly elected consti-

tutional office. The idea that any member of Congress can demand from me a list of everybody I meet with and what they say to me strikes me as—as inappropriate, and not in keeping with the Constitution . . . (unintelligible).

KOPPEL: You're saying—you're saying to Congressman Waxman, then, 'See you in federal court.'

Vice Pres. **CHENEY:** I think that's—may well be how it gets resolved, unless he decides he wants to back off. We, in fact, have responded to a lot of what they requested. We've given them financial records, how we spent money. We thinks that's an appropriate question for the GAO to ask. And, as I say, none of this is secret. These are the 105 recommendations, the product of the task force is all right here. All of that's been public. So, we've complied to a large extent. But this request that in fact we're suppose to provide him with this information with respect to people we consult with or people who come see us., as well as give him information on what was said and those meetings in the executive branch between the **vice president** and other individuals strikes me as—as inappropriate, and we think he's out of line in making that request.

KOPPEL: We've got to take short break. A related question on OPEC when we come back.

Vice Pres. **CHENEY:** Yeah.

KOPPEL: Back with **Vice President Cheney** in just a moment.

Announcer: This is ABC News: **NIGHTLINE**, brought to you by . . .

(Commercial break)

KOPPEL: We are, I've just been informed, in the ceremonial office of the **vice president.** Thank you for having us here. Here with **Vice President Dick Cheney.**

We've been talking about energy policy. So I guess it's appropriate to ask you about OPEC's apparent intent to cut production by one million barrels a day in September. That's going to be problematic, isn't it? I mean, you know, just as we see the price of gasoline going down, just as it looks as though the energy crisis was not as severe, at least in the immediate sense as we may have thought, here comes OPEC and—and the president was indicating he's not happy about it.

Vice Pres. **CHENEY:** Well, what the president said is that the key force is to avoid price spikes. If you get a big run-up in fuel prices, that clearly could adversely effect the American economy. That'll adversely effect the global economy. What's really in our interest as consumers, as well as in the interest as suppliers, is stability over time. When you get these sharp swings in prices everybody may say hurrah if oil goes down to $10 a barrel again, but what happens when that occurs is you drive out a lot of marginal production, which is in the US, shut it in. You lose that, become more dependent on foreign sources. Plus, you also lose the investment that would otherwise occur in non-OPEC sources overseas. And when we get these rapid run-downs in price, it really isn't in anybody's interest. It's always followed eventually by a—you know, if it hits $10, it's only a matter of months before we're back up to 30 or 35.

KOPPEL: Particularly in this community, perception of reality is often more important than objective reality itself. Perception is that you folks are a little hard on the environment. Perception is that you were—you

were late to the mantra of saving energy rather than new energy production.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: I know you claim you've—you've always been an advocate of that. But, again, that's not the way you've been perceived. Your mistake? Our mistake?

Vice Pres. **CHENEY:** Well, I would argue, first of all, that we've been very sensitive right along to the environment and to the need for conservation and renewables. If you look at our report, virtually all of the financial incentives, for example, that we've recommended to the Congress, involve conservation and renewables. We don't have any big financial package in there for conventional production. When we put the report together we right up front made a decision the very first meeting, we had to spend a lot of time on those issues or we wouldn't have a credible report. And we've never changed that.

Now the critics, including The New York Times, for example, editorialized against the report before they ever saw it, have made the allegation that all we care about is production and supply. And that's just not true. We have made the point repeatedly that conservation doesn't close the gap. It doesn't get us there, but it's a very important part of our overall strategy. It's one of the reasons we've gotten to where we are. As a country, we've significantly increased our energy efficiency over the years. And the charge, frankly, isn't true, but it often times it gets picked up and carried, sometimes by the press, and as well as used by our opponents as a way to attack the report.

But the report, just to give you a for instance, Ted, out of 12 recommendations the Sierra Club came up with

not long ago on energy, in their own energy plan, 11 of them are in our report. So the notion that somehow we've created a report here that is anti-environment, you'd have to say, 'Well, the Sierra Club is anti-environment, too.' And it's just not true.

KOPPEL: Let's talk about military budget for a moment. And you have been criticized by one of the most conservative magazines in town, indeed the Weekly Standard.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: You probably read the—the editorial. The Weekly Standard is suggesting to the secretary of defense and his deputy, Paul Wolfowitz, they may want to step down, because what you guys, you and the president, are doing to the military budget is a far cry from that clarion cry of Dick **Cheney** during the campaign, "Help is on the way." They're saying, in point of fact, help is not on the way. You guys are gutting the military budget.

Vice Pres. **CHENEY:** They're wrong. And the man who wrote the editorial was not a supporter of ours in the campaign, anyway. There are big changes that are needed in the military. And it was mistreated, I think, for the last eight years during the Clinton administration. We're still very much saddled with the old Cold War force, and there has not been any new investment in new capabilities moving forward. What Don Rumsfeld has been asked to do, and I think he has a good start on, is putting together a military that makes sense for the 21st century. That'll mean a new strategy, a new set of assumptions about what we need to defend against, and what the threats are out there and what our priorities ought to be in terms of spending.

KOPPEL: Don Rumsfeld came to you asking for a $35 billion increase. He got 18.

Vice Pres. **CHENEY:** I don't know a Cabinet member who wouldn't like to have more money in their budget, but he got more than 18. He got 18 in this most recent go around, but we provided a supplemental in '01 of . . .

KOPPEL: Of five.

Vice Pres. **CHENEY:** . . . almost 5.6 billion, particular.

KOPPEL: But of the initial increase . . .

Vice Pres. **CHENEY:** We have provided an increase, as well, to cover inflation. And we put in extra money that the president pledged over and above the 18 during the course of the campaign for military pay. And all of that's been—been folded in. Now, we'd like to do more, but it's the biggest percentage increase in the defense budget since about 1985.

KOPPEL: If, in fact, you guys are going to be spending 50, 100, 200, who knows, maybe as high as $500 billion on the—the defense initiative, the . . . .

Vice Pres. **CHENEY:** Ballistic missile defense.

KOPPEL: . . . ballistic missile defense initiative, the money has got to come out of somewhere, doesn't it?

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: Where is it going to come from?

Vice Pres. **CHENEY:** Well, we need to do a much better job of managing the Defense Department. It's become very, very hard to run the Defense Department these days. When I was secretary 10 years ago, the defense authorization bill was 70 pages long. Today it's 900 pages long. These are earmarks, red tape requirements

that the Congress has loaded over the years onto the Defense Department, forces you to keep bases open you don't need, to operate installations at inefficient levels, 40 or 50 percent of capacity, to buy things you don't need, to buy equipment at the least efficient rate, instead of going out and buying what you need.

KOPPEL: We've got to take a short break. When we come back, I want to talk to you about the—the two war premise that has always existed . . .

Vice Pres. **CHENEY:** OK.

KOPPEL: . . . over the past 40 or 50 years. Back with the **vice president** in just a moment.

(commercial break)

KOPPEL: And we're back for our final segment with the **vice president** of the United States, Dick **Cheney**.

Mr. **Cheney** we were talking before, very briefly, about the—the two war scenario. The premise ever since the Cold War and before has been that the United States military has got to be capable of simultaneously fighting wars in two different theaters. Do you still subscribe to that?

Vice Pres. **CHENEY:** Well, the—the assumption that's out there now is one I put in when I was secretary of defense. When the Cold War ended, we went from the posture of having the forces in place to fight an all-out global conflict with the Soviet that could go nuclear. When the Soviet Union went away, we then moved to this two major theater contingency, based upon the notion, for example, of defending in the Gulf—Persian Gulf and simultaneously Korea.

KOPPEL: Korea.

Vice Pres. **CHENEY:** I think now we can afford to change that, but that's a question that Don Rumsfeld has been asked to look at and spend a lot of time on. But I think we're today in a—in a radically different situation with respect to—to world threat situation. I think . . . for example, one of the things we need to focus more on today than we have in the past is this notion of homeland defense. It's hard, if you took out around the globe, to find a nation out there today that can mount a significant conventional assault against the United States or our forces. There are few places that are sensitive, obviously, but nothing like what we faced all those years of the Cold War, or even when we were dealing with Saddam Hussein in the Gulf.

KOPPEL: Let me use the last couple of minutes that we have together to bring you back to this notion of nothing drives Washington crazier than secrecy. No one can argue that the—the individual, the man, Dick **Cheney**, has a right to keep what's between him and his doctor private. But you're the **vice president** of the United States. People would like to know what medicines you're on. People would like to know what you're EKG rate is. People would like to know—there's a lot of stuff people would like to know, and you're saying, in effect, 'Yeah, you'd like to know it, but I'm not going to tell you.' Why?

Vice Pres. **CHENEY:** Well, I would argue, Ted, that we have provided an enormous amount of information. I can't—when I get a head cold that's—that's news. I go to the grocery store, what I buy is in the newspapers. If I go to the restaurant, what I eat shows up in the Reliable Source column in The Washington Post,

KOPPEL: That's because you're **vice president** of the United States.

Vice Pres. **CHENEY**: Well. . . .

KOPPEL: We—we—we think we have a claim to your private life.

Vice Pres. **CHENEY**: My—that's right, and my doctors have on at least three occasions given extensive press briefings. The most recent when I went in and had a pacemaker defibrillator implanted here a few weeks ago. They stood up and answered questions for a very long time afterwards, from the most aggressive folks in the press corp, talking exactly about my case and my circumstance, my situation. I'm probably the best known heart patient in America. I think we've provided a vast amount of information.

KOPPEL: Then why not provide the rest?

Vice Pres. **CHENEY**: Well, I think we've provided virtually everything? What does he want to know, my cholesterol level? It's 170.

KOPPEL: Well . . .

Vice Pres. **CHENEY**: You know, my pulse rate is perfectly normal. My blood pressure perfectly normal, 88 over 120.

KOPPEL: And what—what medications are you on?

Vice Pres. **CHENEY**: I'm on a wide variety of traditional heart medications.

KOPPEL: Do you ever, when you're coming to work,. do you ever feel, 'I'm pushing this a little hard.'

Vice Pres. **CHENEY**: That I'm pushing it hard?

KOPPEL: Yeah, that you're—I mean . . .

Vice Pres. **CHENEY**: No, I'm—Ted, this may be a big deal for you or for others who are watching, but I've

lived with this for well over 20 years, since 1978, and I, you know, I'm used to it. I pace myself. I take care of myself. I do those things I need to do. But, I have—say we have provided a vast amount of information to people. If I ever reach a point where I can't do the job or my doctors tell me that I'm not—not up to the task, I'll be the first one to hang it up. I don't need the grief. But I am here to do a job for the president. I think I am able to do it perfectly acceptably, that there's no reason in this day and age why somebody with coronary artery disease can't live a perfectly normal life, and I think I'm proof positive of that.

KOPPEL: You took as though you've lost a little weight, have you?

Vice Pres. **CHENEY**: I have. I have.

KOPPEL: All right, how much weight have you lost?

Vice Pres. **CHENEY**: Over 20 pounds.

KOPPEL: Good for you. In the area of information that some people would like to have, Senator Lieberman would like to have some information from you and he's threatening to throw out a few subpoenas. Do you got any thoughts on that?

Vice Pres. **CHENEY**: He's, I guess, issued subpoena threats to some federal agencies in recent days.

KOPPEL: Right.

Vice Pres. **CHENEY**: You know, I look at that, I think the departments and agencies have been very forthcoming. I think we're back, sort of, the witch hunt mode now in Washington. We're working hard to try to change the tone and what we see there, I think, is—it's politics, as usual.

KOPPEL: You realize, of course, the Democrats would say, 'Wait a second, witch hunt mode? You—you guys. . .'

Vice Pres. **CHENEY:** Well . . .

KOPPEL: '. . . were the ones who were throwing out subpoenas last time around.'

Vice Pres. **CHENEY:** Well, let's—let's look at it, though. The subpoenas that, in fact, the Republicans went after, there were very serious allegation of campaign finance wrongdoing. There were serious other problems, which we won't enumerate tonight. I'm sure your show covered them adequately when they were—were hot. But there were serious questions about possibility of illicit or improper conduct that the Congress was legitimately looking at. There's no such allegation here now. There hasn't been any such allegation, and, in fact, the administration has cooperated. We've provided a great deal of information to—to, the Congress and will continue to do so.

KOPPEL: Mr. **Vice President**, we're out of time. I thank you for your hospitality. Thank you for talking to me and hope to see you again soon.

Vice Pres, **CHENEY:** Thank you, Ted.

KOPPEL: I'll be back in a moment.

Announcer: To receive a daily e-mail announcement about each evening's **NIGHTLINE** and a preview of special broadcasts, logon to the **NIGHTLINE** page at abcnews.com.

(commercial break)

KOPPEL: And that's our report for tonight. I'm Ted Koppel at the White House. For all of us here at ABC News, good night.

LOAD-DATE: July 26, 2001

Source: All Sources> *News* > Transcripts
Terms: nightline vice president cheney *(Edit Search)*
Mandatory Terms: nightline
View: Full
Date/Time: Tuesday, November 13, 2001 - 5:15 PM EST

ATTACHMENT 7

[SEAL OMITTED]

GAO **Comptroller General**

Accountability* Integrity * Reliability **Of the United States**

United States General Accounting Office
Washington, DC 20548

Decision of the Comptroller General Concerning
NEPDG Litigation

January 30, 2002

As you know, the United States General Accounting Office (GAO) has been engaged in an ongoing effort to obtain certain narrowly defined, factual information concerning the development of the National Energy Policy proposal from Vice President Cheney in his role as Chair of the National Energy Policy Development Group (NEPDG). Importantly, we are only seeking limited information in connection with NEPDG-related matters.

The administration used the NEPDG as a mechanism to, among other things, outreach to selected non-governmental parties and develop a proposed comprehensive energy policy. In addition, contrary to recent assertions, we are not seeking the minutes of these meetings or related notes of the Vice President's staff. This was conveyed to the White House in writing on August 17, 2001. Unfortunately, despite our numerous attempts to reach a reasoned and reasonable accommodation on this matter, to date, the information we requested has not been made available to us.

In his August 2, 2001, letter to both Houses of Congress, the Vice President raised a number of objections to providing the information we requested.

Importantly, for both the Congress and GAO, the Vice President challenged GAO's fundamental statutory authority to assist the Congress in connection with its constitutional, legislative and oversight authorities. These challenges went far beyond issues relating to his constitutional position as Vice President and White House staff related matters. As noted in our prior correspondence concerning this matter, the information we are seeking is clearly within our statutory audit and access authority. Accordingly, as provided in our statutory access authority, on July 18, 2001, we issued a formal request for the records, Unfortunately, the statutory 20-day response period passed without any meaningful action by the Office of the Vice President. In accordance with the prescribed statutory process, on August 17, 2001, we reported to the Congress, the President, the Vice President, and other officials that the NEPDG had not provided the requested records. (See enclosed August 17, 2001, report.) While the NEPDG did provide some cost-related documents to GAO, most of these documents were not useful or self-explanatory. Moreover, even though the Vice President and his counsel acknowledge our authority to access cost information, they have not provided us the remaining cost information and explanations requested. Apart from information concerning the Vice President's meetings, they also have not provided us with factual information concerning who the NEPDG staff, including non-White House staff who were assigned to the NEPDG from various government departments and agencies, met with and the purpose of those meetings.

We strongly disagree with the Vice President's objections to our audit and access authority. Significantly, under GAO's statutory access authority, Congress

provided the President and the Director of the Office of Management and Budget a safety valve to preclude judicial enforcement of GAO's access rights. The executive branch has chosen not to use this mechanism. Furthermore, the President has not claimed executive privilege in connection with our request. As previously noted, all of our attempts to reach a reasoned and reasonable accommodation, including reducing the scope of our request, have been rebuffed, and we have now exhausted the statutory process for resolving our access requests. As a result, our only remaining recourse is either to file suit in the United States District Court for the District of Columbia or to forego further assertion of our access rights.

GAO was preparing to go to court in September of this past year until the tragic events of September 11. As I stated last September, prudence dictated that we delay any related legal action given the immediate need for the administration and the Congress to focus on developing our Nation's initial response to our fight against international terrorism and efforts to protect our homeland.

The Congress has a right to the information we are seeking in connection with its consideration of comprehensive energy legislation and its ongoing oversight activities. Energy policy is an important economic and environmental matter with significant domestic and international implications. It affects the lives of each and every American How it is formulated has understandably been a longstanding interest of the Congress. In addition, the recent bankruptcy of Enron has served to increase congressional interest in energy policy, in general, and NEPDG activities, in particular. This, plus the Senate's expected consideration of comprehensive

energy legislation this session, reinforces the need for the information we requested concerning the development of the National Energy Policy proposal. In this regard, we recently received a request for the NEPDG information we are seeking from four Senate committee and subcommittee chairmen with jurisdiction over the matters involved. Importantly, our governing statute requires GAO to perform such committee requests.

Clearly, the formulation and oversight of energy policy and the investigation of Enron-related activities represent important institutional prerogatives of the Congress. Furthermore, a number of other important principles are involved. Failure to provide the information we are seeking serves to undercut the important principles of transparency and accountability in government. These principles are important elements of a democracy. They represent basic principles of "good government" that transcend administrations, partisan politics, and the issues of the moment. As such, they should be vigorously defended. Otherwise, it could erode public confidence in and respect for the institutions of government.

The disclosure of the activities of the NEPDG is also important for precedential reasons. Specifically, the NEPDG was financed with appropriated funds and staffed largely by government department and agency personnel assigned to it. We disagree with the White House position that the formation of energy policy by the NEPDG is beyond congressional oversight and GAO review. Were the Vice President's arguments in this case to prevail, any administration seeking to insulate its activities from oversight and public scrutiny could do so simply by assigning those activities to the

Vice President or a body under the White House's direct control.

In our view, failure to pursue this matter could lead to a pattern of records access denials that would significantly undercut GAO's ability to assist Congress in exercising its legislative and oversight authorities. We would have strongly preferred to avoid litigation in connection with this matter, but given the request by the four Senate committee and subcommittee chairmen, our rights to this information and the important principles and precedents involved, GAO will take the steps necessary to file suit in United States District Court in order to obtain, from the Chair of the NEPDG, the information outlined in our August 17, 2001, report. This will be the first time that GAO has filed suit to enforce our access rights against a federal official. We hope it is the last time that we will have to do so.

We have great confidence in our nation's legal system and look for a timely resolution of this important matter. If you have any questions, comments or concerns, please do not hesitate to contact me.

Sincerely yours,

[signed]

David M. Walker
Comptroller General
of the United States

cc: President of the United States

Vice President of the United States

Enclosure

ATTACHMENT 8

[SEAL]

Judicial Watch
Because no one is above the law.

June 25, 2001

BY CERTIFIED MAIL & FAX

The Honorable Richard B. Cheney
Vice President of the United States of America
Eisenhower Executive Office Building
Washington, DC 20501

Re National Energy Policy Development Group,
A *De Facto* Federal Advisory Committee

Dear Mr. Vice President:

Judicial Watch, Inc., (hereinafter "Judicial Watch"), is a non-profit, public interest law firm that investigates and prosecutes government abuse and corruption.

Recent press reports have detailed the operations and staffing of the National Energy Policy Development Group, (hereinafter, "NEPDG")*. It is clear, based on the political appointments of energy lobbyists and attorneys to senior departmental positions within the government by the Administration, official statements by Administration spokesmen, press reports

* Fineman, Howard and Isikoff, Michael; "Big Energy at the Table; Winning Support for Your Agenda Is Easy When Your Allies Fill Out the Administration's Top Chairs," Newsweek Magazine, May 14, 2001, (Attached).

concerning the activities of energy industry lobbying organizations, as well as other documentation obtained under the Freedom of Information Act (hereinafter, "FOIA"), that the NEPDG is tantamount to a federal advisory committee (hereinafter, "the Committee") as defined in the Federal Advisory Committee Act (hereinafter, "FACA"). 5 U,S.C. App. 2. As such, the NEPDG must file a charter, must allow input from interested persons, must comply with the FOIA and the Government in the Sunshine Act, must publish notice of its meetings in the Federal Register, and must have a board that is fairly balanced in terms of the points of view represented on the Committee, among other requirements of FACA. *See generally* 5 U.S.C. App. 2.

Our specific concerns are illustrated by the appointment of key American Petroleum Institute, (including other energy trade organizations) lobbyists, attorneys, and leaders, such as J. Steven Griles and Thomas Sansonetti, to senior Administration posts with authority bearing directly on the energy policies they represented in a private business capacity. Given the unfortunate ethical history of recent memory concerning conflicts of interest in The White House, Judicial Watch believes it is in the pubic interest for the Administration to avoid even an appearance of possible conflict of interests.

Judicial Watch respectfully requests that, in light of the questionable legal and ethical practices, negative publicity, and public outrage surrounding Hillary Rodham Clinton's 1994 national health-care policy development group, you direct the NEPDG to abide by the FACA. The NEPDG's re-constitution under the provisions of the FACA will instill public trust and confi-

dence in the operations of the Committee, and insure that national policy is formulated, discussed and acted upon in a manner consistent with the best traditions of our Constitutional Republic.

As a public interest law firm, educational foundation and member of the media, Judicial Watch encourages open, accountable government. We trust that you support the same principles, wherever practicable, in the operations of all three branches of government. Certainly, national energy policy is a matter all Americans are keenly interested in, and it is in the public interest for our public servants to engage in an open dialogue and exchange of ideas and options. One positive step toward that goal would be your acknowledgement of the NEPDG as a *de facto* advisory committee under the FACA, and to bring its operations into compliance with all appropriate laws and regulations.

Consistent with our assertion that the NEPDG is a Committee under the FACA, Judicial Watch respectfully requests, under the provisions of the FOIA, 5 U.S.C. 552, and its regulations, copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to the present, as well as a listing (including address) of all persons and entities that participated in NEPDG meetings, either directly or indirectly through agents and/or intermediaries. Thank you for your expected cooperation in responding to our request, which should be within 10 working days pursuant to the expeditious handling provisions of the FOIA (see 5 U.S.C. § 551(a)(6)(C) and 5 U.S.C. 552(a)(6)(E)(ii)(I)). Additionally, Judicial Watch seeks to attend all future meetings of the NEPDG Committee. Please furnish Judicial Watch with future

meeting schedules and contact information so our representatives may attend.

Thank you for your cooperation and prompt response.

Sincerely,

Judicial Watch, Inc.

/s/ LARRY KLAYMAN
LARRY KLAYMAN
Chairman and General Counsel

/s/ THOMAS FITTON
THOMAS FITTON

I OF I STORY

Copyright 2001 Newsweek

Newsweek

May 14, 2001, U.S. Edition

SECTION: NATIONAL AFFAIRS; Pg. 18

LENGTH: 1622 words

HEADLINE: Big Energy at the Table

BYLINE: By Howard Fineman and Michael Isikoff; With Mark Hosenball, T. Trent Gegax and Rich Thomas in Washington

HIGHLIGHT:

Winning support for your agenda is easy when your allies fill out administration's top chairs

BODY:

If you were in the oil and gas business, it was a meeting that dreams were made of. Nine days before George W. Bush was inaugurated, energy lobbyists gathered at the American Petroleum Institutets offices in downtown Washington. Their agenda: to write a wish list. One participant remembers it fondly. "The tone was, 'OK, what do you guys want? You are going to have the ear of this white House'." In came an easel and a whiteboard, and ideas flowed: looser rules for drilling on federal lands; more drilling for oil and gas in Alaska and the Gulf of Mexico; lower royalty payments for tapping offshore wells. After a while, the mood in the room grew giddy. The man from the wildcatters'

association suggested going All the Way. It was time, he said, to rethink the Endangered Species Act.

That was a wish too far. But many items on that board—and other lists scribbled by other energy lobbyists in other offices around town—found their way into the recommendations that the president will unveil to the nation next week. The API list, in fact, was forwarded to George Bush's transition team, which sent it to the Interior Department. On March 20, Interior sent many of the same ideas to the Energy Task Force that Vice President Dick Cheney had convened on Jan. 29. To close the loop, key leaders from that API meeting have since been appointed to pivotal positions in Bush's administration—among them J. Steven Griles, an energy lobbyist and the new second in command at Interior, and Thomas Sansonetti, an energy lawyer recently named the top environmental cop at the Justice Department. The two, in effect, will help administer policies they helped to write.

If the Bush administration is homecoming weekend for the energy industry, Dick Cheney's task-force report is the pregame tailgate party. Not since the rise of the railroads more than a century ago has a single industry placed so many foot soldiers at the top of a new administration. While the report will recommend an array of what one White House aide advertises as "high-tech, 21st-century conservation ideas," its core will be a call to find and use new sources of fossil fuels, as well as a renewed commitment to nuclear power. What voters need to hear "loud and clear," the president declared last week, "is that we are running out of energy in America."

Is there a national "Crisis"? California faces rolling summer-electricity Blackouts. In New York City, officials are scrambling to add small gas-fired generators to handle peak demand. Natural-gas prices have doubled in the past year. The numbers on signs at filling stations are skyrocketing, and could hit $3 a gallon this summer in the Midwest. In a West Wing interview with NEWSWEEK, Cheney shied away from the C word. "I think the potential is there for it to adversely affect the economy," he said.

But voters are using the word. In a NEWSWEEK Poll, 71 percent of those surveyed say there is an "energy crisis" in California; 53 percent agree there now is one in the country as a whole. Given an either-or choice between "protecting the environment" and "developing new sources of energy," those polled selected energy by 52 to 41 percent, compared with a 49-44 ratio just one month ago,

There's something to be said for turning to energy-industry alums in this situation—and Cheney, who like Bush is a son of the oilfields, is not shy about saying it. "The fact of the matter is you get a lot of expertise with people who have been dealing with these issues for a long time," he told NEWSWEEK. In his own case, he said, his time at Halliburton, the globe-girdling oil-services company taught him "a hell of a lot about the technology of the business," such as benign new ways to drill in Alaska's Arctic National Wildlife Refuge.

But Americans are skeptical of industry motives —and, by extension, of Bush's ties. When asked to name who had contributed "a lot" to the current energy situation, those polled named two sets of villains: the U.S. energy companies (66 percent) and overseas energy suppliers, such as OPEC. Bush himself gets his

lowest approval marks for his handling of energy and environmental issues. Democrats, naturally, are pouncing on what they see as a populist hole in Bush's armor. Late last week House Minority Leader Dick Gephardt was stumping in Chula Vista, Calif.; with transmission lines as a backdrop, he vowed to impose new federal caps on electricity rates—an idea Cheney flatly opposes.

The administration may well have raised the political risk via the process it used to draft its plan. The Bushies used a secretive, believers-only process reminiscent of another such enterprise: Hillary Rodham Clinton's effort to write a national health-care plan in 1994. Since the group comprises only government officials, White House aides say, it *is* entitled to keep its deliberations private. Still, industry leaders —who dumped $22.5 million into GOP coffers in the last election—enjoyed constant contact with the task force. Cheney met with a group of utility executives at the Edison Electric Institute, whose president, Tom Kuhn, was a leading Bush fund-raiser. No one has enjoyed better access than Enron CEO Ken Lay, who recently had dinner with his good friend the president.

The environmental community, meanwhile, got one mass meeting with the staff a month ago (and the promise of another this week with EPA Administrator Christine Todd Whitman). Efforts to meet with Cheney were rebuffed. Cheney himself confirmed he had not met with a single spokesman for the greens. That dynamic has only fueled suspicions among enviros about what's going on behind closed doors. "They're drumming up a fake energy crisis that doesn't exist," says Phil Clapp of the National Environmental Trust.

To be sure, the Cheney report will make many nods in the direction of conservation and renewable resources. Cheney confirmed that it will call for tax credits for both. The plan will herald and encourage the advent of less intrusive, high-tech means for finding and extracting oil and gas and for burning more coal. White House spinners have decided to divide the report into five parts—only two of which will deal with the extraction and the transmission of new sources of traditional types of fuel. The conservation measures will be high tech and optimistically can-do about using Yankee ingenuity to give Americans all the cars and appliances they want while using less electricity from state-of-the-art power plants. But there will be no paeans to the kind of pantywaist, tree-hugging self-abnegation the Bushies think President Carter sermonized about a generation ago. "This isn't about not bathing or turning off your lights," said a top Cheney aide. "This is about finding environmentally safe ways to make sure we have the energy we need,"

That's not enough, environmentalists say, given the rising threat of global warming the green community is convinced comes from burning fossil fuels. "The test of any energy plan will she what it does to limit greenhouse gases," says Fred Krupp of Environmental Defense. The Union of Concerned Scientists, concerned about global warming, says that renewables and conservation could displace 20 percent of traditional electricity demand by the year 2020—and greatly lessen the need for new power plants. Cheney thinks otherwise. In that span, he said, reliance on renewables could indeed triple—a "fairly optimistic" scenario but one that would still meet only 6 percent of total electricity needs. But that estimate does not include

imposing tough new mileage standards on SUVs or mandating more efficient appliances. "Part of our task," he said, "is to focus on reality, and reality is not 'Well, gee, we'll conserve our way out, we don't have to produce any more,' or 'Wind and solar will take care of it, so we don't need fossilfuels anymore'."

Now comes the hard part: selling the plan to the public and to Congress. Some GOP strategists are sanguine about overcoming environmental concerns. "Nothing like $3-a-gallon gasoline to help make the case," said one. But it's probably not that simple. White House strategists are looking for clues on how best to hawk the package in polls done for them by the Republican National Committee. The surveys show that voters know very little about where energy supplies come from or how they now are distributed in what has become a relatively deregulated marketplace. "Voters out there think that the government guarantees cheap, abundant energy," said one worried Republican polltaker, "and that's not the way it works anymore." Other insiders worry less about the Democrats than the news media, which they regard as addicted to showing videotape of belching smokestacks. "Bush will have the bully pulpit," says GOP consultant Alex Castellanos, "but it's not an easy sell."

But sell Bush must. He'll take his show on the road next week, joined by a fleet of cabinet secretaries. They will declare that action is needed after years of Clinton-administration neglect. They will say that there are no quick fixes, and tout their market-based, supply-side, long-term answers. They may use real-world vignettes about energy shortages. (on request, the Natural Gas Supply Association provided the White rouse some.) But politics is lived in the short term, and

Bush late last week suddenly found himself in the role of conservation advocate. He ordered federal facilities in California to turn up thermostats, and pledged that they would reduce electricity use by 10 percent. Cheney, the interview over, hurried to the Cabinet Room for the announcement. It turns out that conservation matters a great deal, at least in California, at least for now.

GRAPHIC PHTO: Inner circle Cheney presiding over a meeting of the Energy Task Force last week in the vice president's ceremonial office; PHOTO: The outsider: Clapp claims the Bushies may he ginning up a fake energy crisis; GRAPHIC: (Chart) Energy Advocates in the Bush Pipeline (Graphic omitted)

LOAD-DATE: May 9, 2001

[SEAL]

Judicial Watch

18:59 FAX 202 64

****

***TX REPORT ***

****

TRANSMISSION OK

0514

TX/RX NO	9*818*12024561798
CONNECTION TEL	
SUBADDRESS	
CONNECTION ID	
ST. TIME	06/25 18.57
USAGE T	02'24
PGS. SENT	7
RESULT	OK

501 School Street, SW
Washington, D.C. 20024
Phone: 202-646-5172
Fax: 20-646-5199

FAX

TO: Vice President Cheney From: Larry Kayrnan, Esq.

Fax: 202-456-1798 Date: June 25, 2001

Phone: Pages: 7

Re: Energy Pollicy Development Group CC:

☐Urgent ☐For Review ☐Please Coment ☐Please Reply ☐Please Recyle

comments:

ATTACHMENT 9

OFFICE OF THE VICE PRESIDENT

WASHINGTON

July 5, 2001

Larry Klayman, Esq.
General Counsel, Judicial Watch, Inc.
501 School Street SW, Suite 725
Washington, D.C. 20024

Dear Mr. Klayman:

This is in response to your letter dated June 25, 2001 to the Vice President, Please be advised that the National Energy Policy Development Group is not an "advisory committee" under the Federal Advisory Committee Act and is therefore not subject to FACA's terms, noting especially that it is composed entirely of full-time officers of the Federal Government. In addition, the Freedom of Information Act does not provide for disclosure of the materials you requested. See, 18 U.S. Op. Ofc. Legal Counsel 10 (1994).

Sincerely,

/s/ DAVID S. ADDINGTON
DAVID S. ADDINGTON
Counsel to the Vice President

ATTACHMENT 10

Copyright 2001 The New York Times Company

The New York Times
June 26, 2001, Tuesday, Late Edition-Final

SECTION: Section A; Page 17; Column 1; National Desk

LENGTH: 465 words

HEADLINE: Cheney Withholds List of Those Who Spoke to Energy Panel

BYLINE: by JOSEPH KAHN

DATELINE: WASHINGTON, June 25

BODY:

Vice President Dick Cheney has declined to identify the people who met privately with his energy task force, raising tensions with Congressional investigators who have repeatedly requested the information.

The General Accounting Office, an investigative arm of Congress, sent Mr. Cheney's office a letter late last week complaining that a month had passed since it first submitted an inquiry about the workings of the task force. The letter said the vice president had a legal obligation to provide the information immediately.

Mr. Cheney's office said the letter was sent one day after it submitted 77 pages of documents to the accounting office.

"Our correspondence crossed in the mail," said Juleanna Glover Weiss, a spokeswoman for Mr. Cheney.

But Ms. Weiss said the vice president had not provided the names of people, including industry executives, who may have influenced the formation of

the Bush administration's energy policy, which was released last month.

"Our counsel and the G.A.O. will continue to talk about this," Ms. Weiss said.

The energy task force Mr. Cheney headed spent several months compiling a lengthy energy strategy that contained about 150 recommendations for administrative and legislative actions to address what it termed an energy crisis.

Administration officials have said that they met with a wide variety of people concerned about energy issues, including executives of oil, natural gas, electricity, nuclear power and energy infrastructure companies. They have declined to provide a list of people who had access to the task force.

Some Democrats have asserted that leading Republican donors had special access to the task force and that the energy policy is skewed toward measures favored by major corporations. Two Democratic representatives, Henry A. Waxman of California and John D. Dingell of Michigan, asked the accounting office to report on the officials who served on the task force, what information was collected by the panel, whom they met with and how much the task force spent.

The White House provided the G.A.O. with the financial records of the task force. But administration officials have told the investigative body that they are not compelled to provide the names of outsiders who met with the task force.

The accounting office's general counsel, Anthony H. Gamboa, said in a letter to Mr. Cheney's office last week that the investigative body is entitled to more information.

The letter warned that if the White House does not provide the full range of information the G.A.O. is seeking, it may issue a "demand letter," a more forma request. Under the law, the White House would have 20 days to respond.

If the dispute continues, the accounting office could bring a civil action against the administration.

http://www.nytimes.com

LOAD-DATE: June 26, 2001

DAILY NEWS
express

Cheney Won't Give Up Names

EXPRESS WIRE SERVICES

WASHINGTON

Vice President Dick Cheney remained locked in a battle with the General Accounting Office today over the activities of a White House energy task force.

The GAO, the investigative arm of Congress, has requested a meeting with Cheney discuss an energy task force, of which Cheney was chairman.

Cheney aide Juleanna Glover Weiss said the vice president's office had already forked over a 77-page "financial account of the task force," but has not agreed to meet the GAO request to turn over the names of the people who met with the task force."

"We're still talking to the GAO about that," Weiss said.

The White House task force headed by Cheney met with officials from the oil, natural gas, electric, and nuclear industries, among others, in developing the Bush administration's new national energy plan unveiled last month.

Reps. John Dingell (D-Mich.) And Henry Waxman (D-Calif.) Asked the GAO in April to investigate the task force.

"It is past time for the American People to find out what went on in Cheney's energy task force," Dingell said yesterday. "What are they hiding?"

Original Publication Date: 6/26/01

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

June 25, 2001, Monday, BC cycle

SECTION: Business News, Washington Dateline

LENGTH: 504 Words

HEADLINE: Congress demands list of participants in Cheney energy meetings

BYLINE: By SCOTT LINDLAW, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Congressional investigators are intensifying pressure on the White House to identify who met privately with Vice President Dick Cheney's energy task force.

The General Accounting Office has sent Cheney's lawyer a 10-page letter asserting a legal right to the lists and advising Cheney that it may make a formal demand for the information, rather than the polite requests it has made in recent weeks.

Comptroller General David M. Walker "Is prepared to issue a demand letter . . . if we do not receive timely access to the information," the GAO said in 10-page letter dated Friday from office General Counsel Anthony H. Gamboa to David S. Addington, attorney for the vice president.

The GAO is the investigative arm of Congress, and it has legal authority to federal agency records under

the law. A demand letter could begin a legal battle: It would give Cheney's office 20 days to respond, either by turning over the names, or providing a reason why it is not compelled to do so, said Lynn Gibson, a lawyer for the GAO.

If Cheney declined to turn over the records, the GAO wold notify Congress and Attorney General John Ashcroft, among others. The GAO would also be authorized to file a civil action in court seeking the record, Gibson said.

She knew of no previous case in which the GAO was forced to go to court to obtain agency records.

The White House team that developed the national energy plan, released last month, met with more than 130 interest groups, from environmentalists and unions, often at odds with Republicans, to major Bush supporters who got private sessions with Cheney.

Reps. Henry Waxman, D-Calif., and John Dingell, D-Mich., in April asked the GAO to provide information on who served on the task force, what information was presented to the panel, who presented it and what the task force spent.

The White House has asserted that the GAO does not have the authority to ask for names of participants. However, it agreed that the GAO is entitled to financial records of the task force, and two administration officials said the vice president's office provided 77 pages of financial documents to the GAO last week.

The GAO contends it is entitled to a wider range of records. Federal law "extends GAO's audit authority to all matters related to the use of public money, not just matters related to costs of activities," it argued in its letter to Cheney. "Over the years, GAO has

conducted many reviews that involved a wide range of White House programs and activities."

Juleanna Glover Weiss, a spokeswoman for Cheney, declined to comment on the GAO's assertions, other than to say, "I'm sure the GAO and the vice president's office will be talking about that."\

Waxman and Dingell called on Cheney to provide the information they seek.

"The vice president should stop stonewalling and start cooperating with GAO's investigation," Waxman said Monday. "Congress is entitled to know the identity of the special interests that met with the Cheney energy task force."

LOAD-DATE: June 26, 2001

ATTACHMENT 11

OFFICE OF THE VICE PRESIDENT

WASHINGTON

January 3, 2002

The Honorable Henry A. Waxman
House of Representatives
Washington, D.C. 20515

Dear Representative Waxman:

This is in response to your inquiry by letter of December 4, 2001 about meetings between the Vice President or the former National Energy Policy Development Group's ("Group") support staff and representatives of the Enron Corporation during the preparation of the National Energy Policy that was published on May 17, 2001. The Enron Corporation announced on December 2, 2001 that Enron and certain of its subsidiaries had filed voluntary petitions, for reorganization under Chapter 11 of Title 11 of the U.S. Code in the U.S. Bankruptcy Court for the Southern District of New York. Your letter stated that you viewed it as appropriate to ask whether Enron had communicated "information about its precarious financial position" in any meetings.

Enron did not communicate information about its financial position in any of the meetings with the Vice President or with the National Energy Policy Development Group's support staff. These meetings are described below.

As the Vice President mentioned in his interview on the *Frontline* program on May 17, 2001, the Vice President met with Mr. Kenneth L. Lay, chairman and chief executive officer of the Enron Corporation. The meeting occurred on April 17, 2001 and lasted for about a half-hour. They discussed energy policy matters, including the energy crisis in California, and did not discuss information concerning the financial position of the Enron Corporation.

The National Energy Policy Development Group, which existed from January 29, 2001 to September 30, 2001, had a support staff. As you may recall from my letter to you of May 4, 2001, individuals on the Group support staff met, prior to issuance of the National Energy Policy, with many individuals to gather information relevant to the Group's work. The Group's support staff held such meetings with a broad representation of people potentially affected by the Group's work, including individuals involved with companies or industries (e.g., in the electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline, railroad and automobile manufacturing sectors); environmental, wildlife, and marine advocacy; State and local utility regulation and energy management; research and teaching at universities; research and analysis at policy organizations (i.e., think tanks); energy consumers, including consumption by businesses and individuals; major labor unions; and many Members of Congress or their staffs.

Included among those with whom the Group's support staff met were representatives of the Enron Corporation. The Executive Director of the support staff met on February 22 and March 7, 2001 with Enron representatives and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation. On April 9, 2001, Group support staff held a meeting with about two dozen representatives of various utilities, which was known to include an Enron representative and which did not involve discussion concerning the financial position of the Enron Corporation.

Two additional meetings occurred after publication of the National Energy Policy, one of which was after the termination of the Group. The Deputy Executive Director of the support staff met on August 7, 2001 with officials of an Enron German subsidiary and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation. An employee on the Vice President's staff, who previously was the Executive Director of the Group's support staff, met on October 10, 2001 with Enron representatives and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation.

To summarize, as the above information reflects, during the period that the National Energy Policy was in formulation, the Vice President had only one meeting with Mr. Lay, which was the meeting that the Vice-President mentioned on television in May. During the same period, the National Energy Policy Development Group's support staff, which had meetings with a broad range of individuals involved in energy matters, had

two meetings with Enron representatives, plus a meeting with utility representatives that included an Enron representative. Also described above were two staff-level meetings that occurred well after issuance of the National Energy Policy. None of these meetings included discussion of the financial position of the Enron Corporation.

I note for your information that the Vice President and Mr. Lay of Enron Corporation both served on a panel on June 24, 2001 at the American Enterprise Institute World Forum in Beaver Creek, Colorado. The panel was widely attended and addressed energy matters. There was no discussion of information concerning the financial position of Enron Corporation.

Your letter mentioned a number of Federal officials not employed by the Office of the Vice President. To the extent you wish to inquire about their official activities, I would respectfully refer you to their employing departments, agencies or offices.

The information above is provided to you as a matter of comity between the legislative and executive branches, with due regard for constitutional separation of powers, and reserving all legal authorities and privileges that may apply. It is our hope that submission of the information will help you avoid the waste of time and taxpayer funds on unnecessary inquiries.

Sincerely,

/s/ DAVID S. ADDINGTON
DAVID S. ADDINGTON
Counsel to the Vice President

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No.: C 02 0462

SIERRA CLUB, A CALIFORNIA NONPROFIT CORPORATION, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY AS VICE PRESIDENT OF THE UNITED STATES AND CHAIRMAN OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP

THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, AN ADVISORY COMMITTEE COMMISSIONED BY PRESIDENT GEORGE W. BUSH, JR.,

ANDREW LUNDQUIST, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, AND DIRECTOR OF ENERGY POLICY FOR VICE PRESIDENT CHENEY AND SENIOR POLICY ADVISOR TO THE DEPARTMENT OF ENERGY,

SPENCER ABRAHAM, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

DONALD EVANS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

GALE NORTON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

PAUL O'NEILL, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

NORMAN MINETA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

CHRISTINE TODD WHITMAN, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
Violations of Federal Advisory Committee Act, 5 U.S.C. Appendix 2

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

The Sierra Club brings this action to enforce the Federal Advisory Committee Act, 5 U.S.C. Appendix 2,

("FACA"), a "sunshine law" providing for public scrutiny of the manner in which the Executive Branch obtains advice from private individuals on policy matters. The Sierra Club seeks access to information under FACA concerning the activities of the National Energy Policy Development Group (better known colloquially as the "Cheney Energy Task Force"), and its related sub-groups ("Task Force Sub-Groups"). The Cheney Energy Task Force is a Presidential advisory committee, the purpose of which is to gather information, deliberate and make recommendations to the President on national energy policy.

JURISDICTION

1. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1361 (mandamus), 5 U.S.C. §§ 701 *et seq.* (Administrative Procedure Act) and 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgment Act). Venue in this district is proper under 28 U.S.C. § 1391(e) because the Sierra Club is incorporated in California and maintains its headquarters and resides in this district.

INTRADISTRICT ASSIGNMENT

2. Pursuant to Civil Local Rule 3-2(c), Plaintiff states that it bases venue in this district and the San Francisco Division on the following: 1) Plaintiff is incorporated in California and maintains its headquarters and resides in San Francisco County; 2) this action seeks relief against federal officials acting in their official capacities; and 3) 28 U.S.C. §§ 1361 and 1391(e) provide for venue in the district of Plaintiff's residence, including the San Francisco Division.

PARTIES

3. Plaintiff Sierra Club is a nonprofit corporation organized under California law, with more than 700,000 members nationwide. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystem; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

4. The Sierra Club's concerns encompass the nation's use of energy and the environmental and health impacts caused by the development, extraction, production and use of energy. The Sierra Club has actively participated in the public discussion regarding the Bush Administration's national energy policy. The Sierra Club has educated its members about national energy policy, participated in and organized community events, such as rallies and demonstrations; discussed energy policy with members of Congress and other government leaders, and sought to disseminate information on energy policy via the media.

5. Sierra Club members reside in, work in, and regularly visit, use, and enjoy areas that would be affected by the Bush Administration's energy policy. These areas include, among many examples, federal public lands, national forests, and coastal areas subject to oil and gas drilling and related activities; and populated areas downwind of power plants and other sources of energy-caused pollution. Moreover, Sierra Club members routinely make use of information concerning energy policy while engaging in First Amendment activities as environmentalists and Sierra Club members.

6. Defendant Richard Cheney is sued in his official capacity as the Vice President of the United States and Chairman of the Cheney Energy Task Force. As the Chairman of the Cheney Energy Task Force, Vice President Cheney acted on behalf of the President in gathering information, advice and recommendations on national energy policy and supervising the work of the Cheney Energy Task Force and the Task Force Sub-Groups. He participated in meetings and deliberations, and his office contributed to the formulation of the Bush Administration's national energy policy.

7. Defendant National Energy Policy Development Group ("Cheney Energy Task Force") is a Presidential advisory committee, the purpose of which is to gather information, deliberate and make recommendations to the President on national energy policy.

8. Defendant Lundquist is sued in his official capacity as Executive Director of the Cheney Energy Task Force, Director of Energy Policy for Vice President Cheney, and Senior Policy Advisor to the U.S Department of Energy. As the Executive Director of the Cheney Energy Task Force, he participated in its meetings and deliberations, and contributed to the formulation of the Bush Administration's national energy policy.

9. Defendant Abraham is sued in his official capacity as Secretary of Energy and member of the Cheney Energy Task Force. Defendant Abraham participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

10. Defendant Evans is sued in his official capacity as Secretary of Commerce and member of the Cheney Energy Task Force. Defendant Evans participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

11. Defendant Norton is sued in her official capacity as Secretary of the Interior and member of the Cheney Energy Task Force. Defendant Norton participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

12. Defendant Veneman is sued in her official capacity as Secretary of Agriculture and member of the Cheney Energy Task Force. Defendant Veneman participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

13. Defendant O'Neill is sued in his official capacity as Secretary of the Treasury and member of the Cheney Energy Task Force. Defendant O'Neill participated in Cheney Energy Task Force meetings and deliberations,, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

14. Defendant Mineta is sued in his official capacity as Secretary of Transportation and member of the Cheney Energy Task Force. Defendant Mineta participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

15. Defendant Whitman is sued in her official capacity as Administrator of the Environmental Protection Agency and member of the Cheney Energy Task Force. Defendant Whitman participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

BACKGROUND

The Cheney Energy Task Force

16. On or about January 29, 2001, George W. Bush signed a memorandum to his Vice President, Richard Cheney, commissioning the Cheney Energy Task Force. The Presidential memorandum stated that the purpose of the Cheney Energy Task Force was to develop a national energy policy. The membership of the Cheney Energy Task Force included the defendants.

17. The Cheney Energy Task Force held its first meeting on or about January 29, 2001. The Task Force held at least eight additional meetings between February and May of 2001 and, on information and belief, continued its activities thereafter.

18. On information and belief, the defendants arranged, participated in and exercised responsibility over meetings and other activities involving groups of energy industry executives and other non-federal employees, for the purpose of obtaining advice and recommendations on the Administration's national energy policy. These groups are what are referred to as the "Task Force Sub-Groups" in this Complaint.

19. On information and belief, the Cheney Energy Task Force and Task Force Sub-Groups were not composed wholly of full time officers or employees of the federal government. Energy industry executives, including multiple representatives of single energy companies, and other non-federal employees, attended meetings and participated in activities of the Cheney Energy Task Force and Task Force Sub-Groups.

20. On information and belief, the participants in the Cheney Energy Task Force and the Task Force Sub-Groups interacted significantly and acted collectively in expressing their viewpoints and advice on energy policy.

21. On information and belief, there was continuity in the membership of the Cheney Energy Task Force and Task Force Sub-Groups.

22. On or about May 16, 200 1, the Cheney Energy Task Force submitted a report to President Bush, setting forth the Task Force's findings and recommendations for a "National Energy Policy."

23. The Cheney Energy Task Force and the Task Force Sub-Groups were established or utilized by the President and the defendants for the purpose of obtaining information, advice and recommendations for the development of the "National Energy Policy." The

Bush Administration has developed legislative proposals based on the "National Energy Policy." The House of Representatives has passed legislation containing many of the elements of this National Energy Policy. That legislation and related energy policy legislative proposals are still pending.

The Bush Administration's Failure to Divulge Cheney Energy Task Force Information

24. The defendants have refused to provide information to Congress, the General Accounting Office or the public (including the Sierra Club) concerning the names of non-federal employees who participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups, or details about the number of meetings such individuals attended, the agendas of each meeting, the purpose and scope of the meeting(s), the topics on which factual information or policy advice was sought, and whether conflicts of interest were properly addressed at each meeting.

25. Throughout the spring and summer of 2001, and continuing to the present, Congressional leaders and the General Accounting Office (GAO) have sought to obtain information from the Cheney Energy Task Force and its members concerning the activities and membership of the Cheney Energy Task Force and Task Force Sub-Groups. Representatives Henry Waxman and John Dingell, GAO Comptroller General David Walker and GAO General Counsel Anthony Gamboa have requested access to Cheney Energy Task Force and Task Force Sub-Group information, corresponding numerous times with Vice President Cheney, Cheney Energy Task Force Executive Director Andrew Lundquist, and Counsel to the Vice President David Addington.

26. The Vice President, Mr. Lundquist, and Mr. Addington have failed to provide the information requested by Representatives Waxman and Dingell and the GAO.

27. On or about January 16, 2002, Representative Henry Waxman issued a report detailing how the Cheney Energy Task Force's final report advocated energy policies favoring private companies whose representatives participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups.

28. The Sierra Club has corresponded with the defendants requesting information relating to activities of the Cheney Energy Task Force and the Task Force Sub-Groups including, but not limited to, the involvement of non-federal employees. Defendants have failed to provide this information to the Sierra Club. The Sierra Club intends to use this information to educate its members and, on behalf of its members, to participate actively in the ongoing national debate over energy policy, including but not limited to specific legislative proposals pending in Congress.

FIRST CLAIM FOR RELIEF
(Violations of FACA / Mandamus)

29. The Sierra Club incorporates by reference the allegations of the preceding paragraphs of this Complaint.

30. The Cheney Energy Task Force and Task Force Sub-Groups are advisory committees as defined under FACA.

31. The defendants have violated FACA as follows:

a. By failing to open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public. (Violation of FACA § 10(a)(1).)

b. By failing to publish timely notice of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups in the Federal Register. (Violation of FACA § 10(a)(2).)

c. By failing to allow the Sierra Club and other interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(a)(3).)

d. By failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(b).)

e. By failing to keep detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(c).)

f. By establishing the Task Force Sub-Groups without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing the Task Force Sub-Groups is in the public interest. (Violation of FACA § 9(a).)

g. By allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by FACA. (Violation of FACA § 9(c).)

32. The defendants have a nondiscretionary duty to comply with the procedural requirements of FACA including but not limited to those set forth in the preceding paragraph as items (a) through (g).

33. This Court has jurisdiction to compel the defendants to perform a nondiscretionary duty pursuant to the Mandamus and Venue Act, 28 U.S.C. § 1361.

SECOND CLAIM FOR RELIEF
(Violations of FACA / Administrative Procedure Act)

34. The Sierra Club incorporates by reference the allegations of the preceding paragraphs of this Complaint.

35. By violating FACA as set forth in paragraph 11, the agency defendants have acted arbitrarily and capriciously and not in accordance with law, and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(A) and § 706(2)(D).

PRAYER FOR RELIEF

36. The Sierra Club prays for relief and judgment as follows:

A. A declaration that the Cheney Energy Task Force and Task Force Sub-Groups are advisory committees under FACA and must comply with all requirements of FACA, 5 8 U.S. C. Appendix 2, and other applicable laws.

B. A declaration that the defendants have violated FACA in the following ways:

i. Defendants violated section 10(a)(1) of FACA by failing to open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public.

ii. Defendants violated section 10(a)(2) of FACA by failing to publish timely notice of each meeting of the Energy Task Force and Task Force Sub-Groups in the Federal Register.

iii. Defendants violated section 10(a)(3) of FACA by failing to allow the Sierra Club and other, interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and Task Force Sub-Groups.

iv. Defendants violated section 10(b) of FACA by failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force and Task Force Sub-Groups.

v. Defendants violated section 10(c) of FACA by failing to keep detailed minutes of each meeting of the Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups.

vi. Defendants violated section 9(a) of FACA by establishing the Task Force Sub-Groups without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing the sub-groups is in the public interest.

vii. Defendants violated section 9(c) of FACA by allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by section 9(c) of FACA.

C. A declaration that the defendants have failed to perform a nondiscretionary duty to comply with the procedural requirements of FACA including those set forth in the preceding paragraph as items (i) through (vii).

D. A declaration that each violation of FACA described above as items (i) through (vii) in paragraph B is arbitrary and capricious and not in accordance with law, and, without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(A) and (D).

E. A permanent injunction prohibiting the defendants from convening, conducting or holding any activities of the Cheney Energy Task Force and Task Force Sub-Groups that are not in full compliance with sections 5, 9 and 10(a)-(c) of FACA.

F. A permanent injunction ordering the defendants to provide to the Sierra Club, within ten working days and at no cost to the Sierra Club, a full and complete copy of all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force or Task Force Sub-Groups, irrespective of whether any such document otherwise is or could be exempt from disclosure under 5 U.S.C. § 552(b)(2), (5) or (7)-(9).

G. A permanent injunction ordering the defendants to prepare and deliver to plaintiff, within 10 working days, detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups.

H. An award to the Sierra Club of its costs of suit.

I. An award of such other relief as this Court deems appropriate.

DATED: January 25, 2002.

Respectfully submitted,

/s/ ALEX LEVINSON
Patrick Gallagher
Alex Levinson
Sierra Club
Attorneys of Record

CERTIFICATION OF INTERESTED PARTIES OR ENTITIES

Pursuant to General Order No. 48, the undersigned certifies that as of this date, there is no such interest to report.

Dated: January 25, 2002.

Respectfully submitted,

/s/ ALEX LEVINSON
Patrick Gallagher
Alex Levinson
Joanne Spalding
Sierra Club
Attorneys of Record

THE WHITE HOUSE

WASHINGTON

January 29, 2001

MEMORANDUM FOR

THE VICE PRESIDENT
THE SECRETARY OF THE TREASURY
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF ENERGY
THE DIRECTOR OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY
THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY
THE ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF OF STAFF FOR POLICY
THE ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY
THE ASSISTANT TO THE PRESIDENT FOR INTERGOVERNMENTAL AFFAIRS

SUBJECT: National Energy Policy Development Group

One of the greatest challenges facing the private sector and Federal, State, and local governments is ensuring that energy resources are available to meet the needs of our citizens and our economy. To help address this challenge, I am asking the Vice President to lead the development of a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future. Accordingly, I direct as follows:

1. Establishment. There is hereby established within the Executive Office of the President an Energy Policy Development Group, consisting of the following officers of the Federal Government: the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs. The Vice President may also invite the Chairman of the Federal Energy Regulatory Commission to participate. The Vice President nay invite the participation of the Secretary of State when the work of the Energy Policy Development Group involves international affairs and, as appropriate, other officers of the Federal Government. The Vice President shall preside at meetings of the Energy Policy Development Group, shall direct its work, and may establish subordinate working groups to assist the Energy Policy Development Group in its work.

2. Mission. The mission of the Energy Policy Development Group shall be to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. In carrying out this mission, the Energy Policy Development Group's functions shall be to gather

information, deliberate, and, as specified in this memorandum, make recommendations to the President. Its activities shall not supplant the authority and responsibility of State and local governments for handling energy production, purchase, and distribution difficulties.

3. Reports. The Energy Policy Development Group should submit reports to me as follows: (a) in the near term, an assessment of the difficulties experienced by the private sector, and State and local governments in ensuring that local and regional energy needs are met, and (b) as soon thereafter as practicable, a report setting forth a recommended national energy policy designed to help the private sector, and as necessary and appropriate State and local governments, promote dependable, affordable, and environmentally sound production and distribution of the energy for the future. The recommended national energy policy should take into consideration, among other things, (i) the growing demand for energy, locally, regionally, and nationally, in the United States and in the world, (ii) the potential for local, regional, or national disruptions in energy supplies or distribution, and (iii) the need for responsible policies to protect the environment and promote conservation, and (iv) the need for modernization of energy generation, supply, and transmission infrastructure.

4. Funding. The Department of Energy shall, to the maximum extent permitted by law and consistent with the need for funding determined by the Vice President after consultation with the Secretary of Energy, make funds appropriated to the Department of Energy available to pay the costs of personnel to support the activities of the Energy Policy Development Group. If a situation arises in which Department of Energy

appropriations are not available for a category of expenses of the Energy Policy Development Group, the Vice President or his designee should submit to me a proposal for use, consistent with applicable law, of the minimum necessary portion of any appropriation available to the President to meet the unanticipated need. The Vice President may also obtain, through the Assistant to the President for Economic Policy, such assistance from the National Economic Council staff as the Vice President deems necessary.

5. Termination. The Energy Policy Development Group shall terminate no later than the end of fiscal year 2001.

/s/ GEORGE BUSH
GEORGE BUSH

cc: Secretary of State
Chairman, Federal Energy Regulatory Commission

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

PLAINTIFFS' PROPOSED DISCOVERY PLAN

Pursuant to this Court's order of July 11, 2002, plaintiffs submit this proposed Discovery Plan.

Subjects of Discovery

Plaintiffs intend to take initial discovery on the following subjects:[1]

A. The structure of the Task Force and its working groups, sub-groups, staff, and personnel; *e.g.*, how many sub-groups exist, their roles, staff, meetings, location of meetings, and other proceedings. *See Judicial Watch,*

[1] Drafts of plaintiffs' First Set of Interrogatories and First Request for the Production of Documents are attached hereto as Exhibits A and B, respectively.

Inc. v. *National Energy Policy Dev. Group*, Civ. No. 01-1530, slip op. at 70 (July 11, 2002) ("Mem.") (noting importance of "[d]etermining who participated in the deliberations of the NEPDG and the alleged Sub-Groups," and "whether in fact those Sub-Groups existed"); *Association of Am. Physicians & Surgeons* v. *Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) (noting importance of "purpose, structure, and personnel of the group" in "determin[ing] whether [the Federal Advisory Committee Act] applies").

B. Private parties' communications with, and participation in the activities of, the Task Force and/or Task Force sub-groups, working groups, staff and personnel; *e.g.*, who attended Task Force meetings and their role at these meetings, which private parties communicated with the Task Force, the contents of these communications. *See* Mem. at 70 (noting importance of determining "who interacted with the private individuals involved, the role played by private individuals, and the number of meetings and interactions"). *See also* Clinton, 997 F.2d at 915 ("If a [private party] regularly attends and fully participates in working group meetings as if he were a 'member,' he should be regarded as a member.").

C. The relationship between the agency defendants, the Task Force and/or any other advisory groups that included private individuals; *e.g.*, whether these other advisory group(s) were established and/or utilized by the Task Force or agency defendants, and whether these other group(s) were formed in the interest of advising an agency or the Task Force. *See* 5 U.S.C. App. II § 3(2) (advisory committee must be established or utilized by President or agency in order for FACA to apply). *See California Forestry Ass'n* v. *U.S. Forest*

Service, 102 F.3d 609, 611 (D.C. Cir. 1996) (where "circumstances of [the group's] genesis support an inference that [the group] was in fact established 'in the interest' of advising an agency," the group "is subject to FACA"). *See also* Mem. at 35 ("If these Sub-Groups did in fact exist, who made the decision to establish them?").

II. Anticipated Discovery

Plaintiffs' first set of interrogatories and first set of requests for production are attached hereto as Exhibits A and B, respectively. Following timely receipt of responses to this initial discovery, plaintiffs intend to notice appropriate depositions, and may also seek additional written discovery.

Pursuant to this Court's order of May 29, 2002, the Sierra Club has also served subpoenas on seven private parties, intended to ensure the preservation of discoverable documents in those parties' possession. Depending upon the defendants' responses to the Sierra Club's initial discovery, to the extent such evidence is not otherwise available the Sierra Club may request production of relevant documents or testimony from these or other third parties.

Respectfully submitted,

Patrick Gallagher (CA Bar No.146105)
Alex Levinson (CA Bar No.135307)
Sanjay Narayan (CA Bar No. 183227)
Sierra Club
85 Second Street
San Francisco, CA 94104
(415) 977-5696

Email: *pat.gallagher@sierraclub.org*
David Bookbinder (DC Bar No. 455525)
Sierra Club
408 C Street, NE
Washington, DC 20002
(202) 548-4598
Email: *david.bookbinder@sierraclub.org*

Roger Adelman (DC Bar No. 056358)
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 822-0600
Email: *Adelmarm@erols.com*

Attorneys for plaintiff Sierra Club

Larry Klayman (DC Bar No. 334581)
Paul J. Orfanedes
Judicial Watch, Inc.
501 School Street, SW
Suite 725
Washington, DC 20024

Attorneys for plaintiff Judicial Watch, Inc.

Certificate Of Service

I hereby certify that a copy of this Discovery Plan was served via ECF Notification where applicable and via first class mail this 19th day of July, 2002 to:

Roger Adelman (DC Bar No. 056358)
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W., Suite 730
Washington, DC 20036
(202) 822-0600
Email: *Adelmarm@erols.com*

Larry Klayman
Paul J. Orfanedes
Judicial Watch, Inc.
501 School Street, S.W.
Suite 725
Washington, D.C. 20024
E-Mail: meseidy21@hotmail.com

Daniel Edward Bensing
U.S. Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
Room 818
Washington, D.C. 20530
E-Mail: daniel.bensing@usdoj.gov

Thomas Millet
Jennifer Paisner
U.S. Department of Justice
901 E Street, N.W.
Room 952
Washington, D.C. 20530
E-Mail: Jennifer.Paisner@usdoj.gov

Richard D. Horn
Bracewell & Patterson LLP
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006-1872
E-Mail: rhorn@bracepatt.com
Paul Christian Rauser
Williams & Connelly
725 12th Street, N.W.
Washington, D.C. 20005

Robert S. Litt
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1206
E-Mail: Robert_Litt@aporter.com

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
E-Mail: howardcrystal@meyerglitz.com

Kathleen M. Krust

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED DISCOVERY PLAN

INTRODUCTION

As the Court knows, it is defendants' position that discovery is inappropriate in this case, especially in light of the strong potential for intrusion into the effective functioning of the Presidency and Vice Presidency. The Court's July 11 Order, however, significantly limits any potential discovery issues. In its Order, the Court held that plaintiffs' claim that defendants violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 2, can proceed, if at all, under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, or the mandamus statute, 28 U.S.C. § 1361.

See Judicial Watch, Inc. v. National Energy Policy Dev. Group, Civ. No. 01-1530, slip op. at 42, 51 (July 11, 2002) ("Mem."). That ruling has important implications for discovery in this case. It is well settled that a court's review under the APA is confined to the administrative record compiled by the agency. That is, there is no discovery under the APA (or under the mandamus statute, where mandamus is used as a substitute for APA review). For this and other reasons set forth below, defendants object to plaintiffs' proposed discovery plan.[2]

Moreover, this case can be resolved far short of the wide-ranging inquiries plaintiffs have proposed into the conduct of the NEPDG in carrying out its Presiden-

---

[2] While, given the posture of this case after the Court's July 11, 2002 Order, plaintiffs' claims should be resolved on the basis of an administrative record, defendants do not concede there was agency action, and preserve and reiterate their arguments regarding the inappropriateness of discovery in other respects as well (because plaintiffs' proposed discovery has not been approved by the Court, defendants are not submitting specific objections to plaintiffs' proposed requests). For the same reason that the application of the FACA to the activities of the National Energy Policy Development Group ("NEPDG") raises constitutional concerns, *see Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993), permitting discovery into the questions posed by plaintiffs in their discovery plan—such as from whom the President receives advice, how he chooses to receive that advice and what that advice is—would impermissibly intrude on the effective functioning of the Presidency and Vice Presidency, especially the President's authority to obtain advice in confidence from his hand-picked advisers. *See id.* at 908 (application of FACA to health care task force "clearly would interfere with the President's capacity to solicit direct advice on any subject related to his duties from a group of private citizens, separate from or together with his closest governmental associates").

tially-assigned mission (inquiries, we note, that would severely intrude into the functioning of the Presidency and Vice Presidency). Specifically, in its opinion, the Court identified as one of the central questions posed in this case: "were any non-governmental individuals members of the NEPDG and its alleged sub-groups?" *See, e.g.*, Mem. at 54. This question, which potentially is dispositive, can and should, be resolved on the basis of the administrative record, before permitting inquiry into any of the other issues raised by this case. If the record demonstrates the answer to this question is "no," then the Court can grant summary judgment for the defendants.

Accordingly, defendants submit that further proceedings should be conducted in a manner that respects established principles under the APA and is least likely to intrude into constitutionally protected areas of inquiry. This Court's holding that plaintiffs' cause of action arises under the APA (or mandamus) makes that approach possible. In order to accomplish this objective, defendants thus propose the following.

First, defendants will file an administrative record which will address the question of membership. Defendants will then move for summary judgment on the basis of that record, as is routinely done in administrative law cases. As the Court has recognized, if neither the NEPDG nor any alleged subgroups included non-government members, defendants would be entitled to prevail on statutory grounds. *See* Mem. at 54; 5 U.S.C. app. § 3(2). The Court thus, at the very least, should resolve this critical statutory issue before proceeding to the types of inquiries suggested by plaintiffs (*see also* Mem. at 70), which, by virtue of their breadth, pose a far greater threat of constitutionally impermissible

intrusion into the effective functioning of the Presidency and the Vice Presidency. Moreover, this limited approach is consistent with this Court's view of constitutional avoidance. As this Court stated, "It is entirely possible that defendants will prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committee at issue . . . thus rendering defendants' constitutional concerns inapplicable." Mem. at 54.[3]

Defendants note that the Court already has before it a record on the membership issue, at least with respect to NEPDG. That is, the Court and the plaintiffs already have the Presidential Memorandum establishing the NEPDG (which designates the membership), the NEPDG's public report (which was submitted to the President by the NEPDG as constituted by the President), and the Office of the Vice President's response to plaintiff Judicial Watch's request for permission to attend NEPDG meetings. As explained in more detail below, however, defendants are prepared to supplement this record with a declaration specifically explaining the basis for the determination that the NEPDG is not required to comply with FACA, *i.e.*, NEPDG's membership. Defendants also are prepared to submit an administrative record (including with appropriate declarations) on the issue of membership with respect to any alleged subgroups, now that the issue has been raised here.

---

[3] Ultimately, the burden of persuasion is, of course, upon the plaintiffs to prove that FACA applies to the NEPDG.

Second, the Court should establish a schedule for briefing summary judgment on the membership issue once the record is filed by defendants. As noted above, if the record demonstrates that no non-government individuals were members of the NEPDG or any alleged sub-groups, then summary judgment should be granted for defendants. *See, e.g.*, Mem. at 54. And the Court's stated goal of having a "tightly reined" process to decide the issues in this case, *see* Mem. at 74, will be accomplished.

ARGUMENT

REVIEW SHOULD BE ON THE RECORD, AND LIMITED AT THIS STAGE TO THE THRESHOLD, AND POTENTIALLY DISPOSITIVE, ISSUE OF MEMBERSHIP

A. Review Of Any Factual And Legal Issues In this Case Should Be On the Basis of the Administrative Record

The Court has held that FACA provides no private right of action and that plaintiffs' claim that defendants violated FACA can proceed, if at all, under the APA, or, potentially, under the mandamus statute. *See* Mem. at 42, 51. This holding has important consequences for this case and effectively determines the course by which any factual issues should be resolved.

In APA challenges to agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Nat'l Law Ctr. v. United States Dep't of Vet. Affairs*, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("It is settled that a court's review . . . is confined to the administrative record compiled by the agency"); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions."). Plaintiffs challenging agency action are not ordinarily entitled to discovery. *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993); *Nat'l Treasury Employees Union v. Seidman*, 786 F. Supp. 1041, 1046 (D.D.C. 1992) ("discovery is inappropriate in cases under the APA").[4]

In this case, the scope of judicial review is defined by 5 U.S.C. § 706's test for action that is arbitrary or capricious or otherwise contrary to law.[5] Under this test, the Court's review is not de novo. *Camp v. Pitts*, 411 U.S. at 142; *Commercial Drapery Contractors, Inc. v. United States*, 133 F. 3d 1, 7 (D.C. Cir. 1998). Where, however, the articulated decision may be less than clearly based upon the record, a remand or supplementation of the record may be appropriate, such as through affidavits. *Camp*, 411 U.S. at 142; *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

---

[4] The D.C. Circuit's decision in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), does not alter this conclusion. As this Court has indicated, *AAPS* did not address the source of judicial review available to a party claiming violations of FACA. Mem. at 26. Instead, it "assumed that FACA provided a cause of action." *Id.* Therefore, the restraints on discovery applicable in an APA action were not applied in that action. However, after this Court's decision that FACA does not apply a private right of action, *id.* at 25-26, plaintiffs are constrained by the APA remedy that they seek.

[5] The arbitrary or capricious test applies because this is not formal rulemaking or adjudication or a failure to act. 5 U.S.C. § 706.

Here, there is a record before the Court, consisting of the President's memo creating the NEPDG and establishing its membership, the letter from the Office of the Vice President denying plaintiff Judicial Watch's request for documents and documenting the rationale that the FACA does not apply because its members were federal employees, and the final Report, which was submitted by the NEPDG as constituted by the President and thereby confirms, in the performance of the NEPDG's final function, that the members were those designated by the President. The only record before the Court on the question of membership thus fully supports defendant's position here. It therefore warrants summary judgment in defendants' favor.

Despite their access to thousands of pages of documents produced in related FOIA litigation, plaintiffs have proffered no evidence to demonstrate that the NEPDG's composition was any different from that directed by the President. Nevertheless, defendants will submit a declaration further addressing this issue to provide a fuller statement of the facts which supported the decision, as memorialized in the Vice President's letter, that the FACA did not apply to the NEPDG because its members were federal employees. Similar declarations will also be filed concerning the alleged subgroups. At that point, the Court would have before it a more than sufficient administrative record upon which to decide this caes.

As in any other APA record review case, plaintiffs would be able to justify going beyond that record only upon a "'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." *Commercial Drapery*, *supra* at 7, *quoting Citizens to Preserve Overton Park*, 401

U.S. 402, 420 (1971). Thus, plaintiffs could proffer whatever evidence they currently possess to the contrary, and the Court could determine whether that evidence is sufficiently compelling to require a further response from defendants.[6]

B. Plaintiffs' Mandamus Claims Do Not Expand the Scope of Review

With respect to plaintiffs' potential mandamus claim, *see* Mem. at 51, review under the mandamus statute—even if it existed in a case such as this one—should, at the very least, be no broader than review under the APA. As the Court has recognized, both the APA and the mandamus statute would be used for the same purpose: to remedy an alleged violation of FACA. Where it is available at all, mandamus is only available as an avenue of extraordinary relief, *see, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); in cases where the "plaintiff has a clear right to relief," *Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996); *see also Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (reaffirming that mandamus is only available where plaintiff's right to relief is "clear and indisputable"); *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 112 n.9 (3d Cir. 1996) (indicating that standard for issuing mandamus is more stringent than review under *Chevron*); and only where a party "has exhausted all other avenues of relief. . . ." *Heckler v. Ringer*, 466 U.S. 602, 612 (1984).

---

[6] In contrast, plaintiffs' plan would allow for the discovery of materials outside the record with no initial showing of need and based solely on the bare, unsubstantiated allegations of the complaint.

The requirements of clarity and exhaustion should bar discovery here insofar as mandamus is concerned, especially at this stage of the case. APA review should necessarily proceed first. If the administrative record does not contain evidence that plaintiffs are entitled to relief, and if plaintiffs do not come forward with new and material evidence on the membership issue, then there is no basis for mandamus review. Plaintiffs cannot be allowed to conduct a fishing expedition for some shred of evidence to rebut the administrative record. Consequently, review on the administrative record will necessarily be adequate to address plaintiffs' mandamus claims.

Indeed, it is counterintuitive to conclude that the "extraordinary remedy" of mandamus would entitle plaintiffs to *broader* review than they would receive under the APA. The D.C. Circuit has repeatedly indicated that requests for mandatory injunctive relief against federal officers should be analyzed as requests for mandamus. *See, e.g., Swan*, 100 F.3d at 976 n.1; *National Wildlife Fed'n v. United States*, 626 F.2d 917, 918 n.1 (D.C. Cir. 1980). Since review of a request for injunctive relief under the APA would be limited to the administrative record, a litigant should not be able to circumvent that limitation simply by asking for a writ of mandamus. If anything, mandamus here would require a standard of review *more* deferential to defendants, given the "separation of powers concerns" raised by plaintiffs' claim against the Vice President himself. *See* Mem. at 54 (recognizing these concerns).

Plaintiffs here seek to mandamus, not an agency official, but the Vice President of the United States—one of only two constitutional executive officers of the United States. Moreover, the subject of the mandamus

claim is not an agency action, but the composition of the NEPDG, a group whose membership was defined and limited by, and whose role was prescribed in, a written Memorandum from the President. Containing review to the administrative record is especially compelling in this case as the record contains the President's Memorandum embodying his choices regarding the structure, composition, and role of the group, as well as the group's submission in response to the President's directive. Albeit in a slightly different context, the court in *AAPS* recognized that, "[s]ince form is a factor," the government has a great deal of control over whether a particular group it establishes is subject to FACA. *AAPS*, 997 F.2d at 914. Consequently, as *AAPS* recognized, "it is a rare case when a court holds that a particular group is a FACA advisory committee over the objections of the Executive Branch." *Id.* This is not that "rare case." The record here makes it clear that the President defined and limited membership in the NEPDG in the written Memorandum establishing the group, and his choices regarding the structure, composition, and function of the group—and the response of that group, which consisted of officials at the highest level of the government and in direct proximity to the President—are entitled to the utmost deference.[7]

---

[7] Some courts have indicated that "independent fact finding under mandamus is appropriate *in some circumstances*, even where agency action is under review," and that such independent fact finding can occur based on an administrative record. *See, Conservation Law Foundation of New England, Inc v. Clark*, 590 F. Supp. 1467 (D.C. Mass. 1984). *See also Commonwealth of Pennsylvania v. Nat'l Assoc. of Flood Insurers*, 520 F.2d 11, 26-27 (3rd Cir. 1975). For the reasons explained above, however, such independent fact finding would be highly inappropriate in this case.

Finally, allowing discovery to proceed against the Vice President would effectively decide the thorny constitutional issue of whether mandamus is precluded in this case, especially since the Vice President is not subject to the APA. The serious constitutional implications of permitting such a mandamus claim against the Vice President to proceed should therefore, at a minimum, compel the conclusion that independent fact finding apart from the proffered administrative record is inappropriate.

C. Record Review Should Be Limited at this Stage to the Membership Issue

As this Court's recent opinion held, "a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it." Mem. at 53. By limiting the issue on summary judgment at this point to the inquiry of membership of NEPDG and its alleged subgroups, this Court can avoid any unnecessary inquiry into the internal workings of the NEPDG or its individual members and their supporting staff in carrying out the NEPDG's Presidentially-assigned mission (an inquiry defendants oppose, and one that is unwarranted and unnecessary to resolving this case on statutory grounds). Defendants anticipate the membership issue can be resolved expeditiously. This approach is appropriate for two principal reasons.

First, the Court has recognized that defendants "may prevail on summary judgment on statutory grounds" (*see* Mem. at 75) if the record demonstrates "no private individuals participated as members of the advisory committee at issue." *See id.* at 54. In that event, there will be no "need . . . to address the constitutionality of

applying FACA." *See id.* at 75. Similarly, as to any alleged subgroup, the absence of any non-federal member would be dispositive.

Second, requiring defendants to submit a factual record addressing their constitutional defense (which might require supplementation through appropriate declarations) would itself raise "constitutional issues." *See* Mem. at 75. For example, as the Court has suggested, some of the information relevant to defendants' constitutional defense is likely to encompass documents and other information subject to the constitutional privilege for presidential communications. *See* Mem. at 68-70 (discussing *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997)).

But even more significantly, requiring defendants to submit a record on the constitutional issues now (i.e., before the applicability of FACA is resolved), would force defendants to disclose—potentially unnecessarily—much of the same information plaintiffs seek on the merits (the very information defendants contend they cannot, consistent with the Constitution, be compelled to disclose). Indeed, plaintiffs seek through discovery far more than they would ever be entitled to under the FACA. FACA provides for notice of meetings, that such meetings be open, and that records of the advisory committee be publicly available to the extent not exempt from disclosure. Plaintiff, however, seeks through discovery information about communications between individual NEPDG members outside the context of meetings, between members and agency personnel, and between members and outside individuals.

Accordingly, defendants respectfully submit that, so long as the case may be resolved on statutory grounds, the Court, as a matter of law, comity and efficiency,

should minimize the requirement that the Executive Branch disclose information it contends is constitutionally protected from disclosure. *See* Mem. at 52 (acknowledging the "seriousness" of the constitutional issues). Defendants' proposal that review be limited to the membership issue accomplishes that objective without sacrificing this Court's fact-finding mission.

D. Review of the Membership Issue Should be Tied to the Legal Definition of Membership

FACA expressly excludes from the definition of advisory committee (and thus from the coverage of the statute) "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. app. § 3(2). As explained above, defendants submit that the record (and review thereof) should be limited to the question of membership (i.e., whether any non-federal individuals were members of the NEPDG or any alleged subgroups). Defendants want to make clear, however, that "membership," for purposes of FACA, is by no means as broad a notion as plaintiffs suggest.

The D.C. Circuit in *Association of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"), defined "membership" in an advisory committee: a nongovernment individual should be considered a member of an advisory committee only if "his involvement and role are functionally indistinguishable from those of the other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a 'consultant' *regularly attends and fully participates* in working group meetings as if he were a 'member,' he should be regarded as a member." *AAPS*, 997 F.2d at 915 (emphasis added). Consistent with this

definition of membership in an advisory committee, the *AAPS* court stated that "episodic meetings between government officials and a consultant" would not serve to transform the consultant into a member of the advisory committee. *Id.* "When an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee." *Id.*

In their proposed discovery, plaintiffs seek information about "meetings" attended by "all . . . persons who participated, in any manner, in the activities of the [NEPDG]," *see* Interrogatory No. 3, and further define the term "meeting" to include communications between any "two or more persons where [NEPDG] . . . activities were discussed." See Plaintiffs' First Set of Interrogatories at 2. Plaintiffs' notion of membership has no support in the law. The controlling definition of a FACA "member" as someone who "regularly attends and fully participates" in committee meetings (*AAPS*, 997 F.2d at 915) would exclude from FACA's scope any individual meetings between individual members of the NEPDG and non-government individuals. Under *AAPS*, such meetings can never rise to the level of regular attendance and full participation.

Moreover, any such individual meetings would not constitute committee meetings of NEPDG and would fall outside of the scope of FACA coverage. An advisory committee is covered by FACA only "when it is asked to render advice or recommendations, *as a group*, and not as a collection of individuals." *AAPS*, 997 F.2d at 913 (emphasis in original). It is the collective nature of an advisory committee's deliberations and recommendations that implicates FACA. *See id.* ("The

group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally."). As such, non-government individuals can be considered "members" of an advisory committee only if they regularly attended and participated in the collective decision-making processes of that advisory committee in a manner that is "functionally indistinguishable" from that of a formally appointed member. In this case, then, any sporadic contacts that may have occurred between individual members of the NEPDG and non-government individuals, outside of the context of NEPDG committee meetings, simply would not implicate FACA, and would therefore be outside the scope of any permissible discovery.[8]

The reason for this rule is simple. As *AAPS* recognized, extending the definition of membership to include sporadic meetings between government officials and non-government individuals would "achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens." *Id.*; *see also Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 452 (1989); *Nader v. Baroody*, 396 F. Supp. 1231, 1233-34 (D.D.C. 1975) (finding FACA inapplicable to episodic meetings between White House officials and various private sector representatives because "the Act was not intended to apply

[8] Nor are any such individual meetings, which are not addressed by FACA at all and which would be entirely proper, at all probative of whether a person did assume the role of a full member of the committee. Thus, even if discovery were permitted under either of plaintiffs' claims, plaintiffs' proposals are unjustified, intrusive, and unduly burdensome.

to all amorphous, ad hoc group meetings . . . or in any way to impede casual, informal contacts by the President or his immediate staff with interested segments of the population or restrict his ability to receive unsolicited views on topics useful to him in carrying out his overall executive and political responsibilities"); *American Soc'y of Dermatology v. Shalala*, 962 F. Supp. 141, 148-49 (D.D.C. 1996), *aff'd* 116 F.3d 941 (D.C. Cir. 1997) (finding FACA inapplicable to multispecialty physician panels convened by the Health Care Financing Administration, in part because the episodic contacts between government officials and the non-government panelists did not convert the non-government panelists into committee "members").

Accordingly, supplemental declarations filed by defendants will be consistent with the controlling definition of a FACA "member" as someone who "regularly attends and fully participates" in committee meetings. See AAPS, 997 F.2d at 915.

Because the APA frames the issues remaining in this case, APA review, limited to the administrative record, should frame the resolution of this case. Nevertheless, if, contrary to defendants' position, the Court should order discovery, that discovery must be "tightly reined," as this Court has held. Mem. at 74. Accordingly, it should be limited in scope to the issue of membership and further be limited as to form and to respondent.

As to form, discovery should be limited to written interrogatories. Interrogatories are the least intrusive means for providing information. Any such interrogatories ordered by the Court should be narrowly tailored to answer the question of membership without intruding into unnecessary areas of inquiry and without

requiring the participation of high-ranking government officials, including the Vice President and his staff and Cabinet members who served on the NEPDG.

Plaintiffs' discovery plan is unreasonably intrusive in the form of discovery proposed. In addition to interrogatories, plaintiffs have proposed broad-ranging document requests. While the overwhelming bulk of these requests do not relate to the membership issue, defendants note that plaintiff Judicial Watch already has received documents (as well as agency declarations) in the related FOIA cases.[9] Plaintiffs should be required to thoroughly examine the documents already in their possession before requesting further documentary evidence, most of which may well be duplicative. Indeed, in light of the extensive document production already provided to Judicial Watch in the FOIA litigation, plaintiffs should be required to justify any document request for agency documents before the Court orders defendants to respond to any discovery requests here.

Additionally, plaintiffs' plans to "notice appropriate depositions" should not be permitted. See Plaintiffs' Proposed Discovery Plan at 3. Any request for depositions plainly is premature at this time. Especially with respect to the high-ranking government officials who were participants in NEPDG, any deposition must await a showing that the information plaintiffs seek cannot reasonably be obtained through interrogatories and document requests. The courts have cautioned

[9] If the Court believes it would be helpful in fashioning an appropriate discovery plan, defendants can provide the Court with the relevant declarations, which in many cases address issues of membership, filed in the FOIA cases.

that, due to their greater duties and time constraints, agency heads "are generally not subject to depositions unless they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (holding that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions"); *Peoples v. USDA*, 427 F.2d 561, 567 (D.C. Cir. 1970) ("subjecting a cabinet officer to oral deposition is not normally countenanced"); *Wirtz v. Local 30, International Union of Operating Engineers*, 34 F.R.D. 13, 14 (S.D.N.Y. 1963) (Cabinet members should not be required to give depositions "unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it.").

CONCLUSION

For all of the foregoing reasons, plaintiffs' proposed discovery plan should be rejected. Instead, defendants propose that any further proceedings be conducted in the following manner:

First, defendants will file an administrative record for NEPDG and any alleged subgroups on the question of membership. As explained above, this record will consist of the Presidential Memorandum establishing NEPDG, NEPDG's public report, and the Office of the Vice President's response to plaintiff Judicial Watch's request for permission to attend NEPDG meetings. Moreover, at the time defendants file the record, they will also file supplemental declarations specifically

addressing the membership issue with respect to NEPDG and any alleged subgroups.

Second, the Court should establish a schedule for briefing summary judgment on the membership issue once the record is filed by defendants. Defendants anticipate that this entire process—compiling the record, submitting the record, and briefing—can be accomplished expeditiously. Defendants can submit the administrative record, and their summary judgment brief, by September 9, 2002. Once briefing on summary judgment is complete, the Court can decide this potentially dispositive statutory issue.

Dated: July 29, 2002

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General
ROSCOE C. HOWARD, JR.
United States Attorney
SHANNEN W. COFFIN
Deputy Assistant Attorney General

ANNE L. WEISMANN
D.C. Bar #298190
THOMAS MILLET
D.C. Bar #294405
CRAIG BLACKWELL
D.C. Bar #438758
JENNIFER PAISNER
D.C. Bar #472407
Attorneys, Civil Division
Department of Justice
901 E ST, NW

Room 812
Washington, D.C. 20530
Tel: (202) 616-8268
Fax: (202) 616-8460

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA-02-631

SIERRA CLUB

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.

TRANSCRIPT OF STATUS HEARING BEFORE THE
HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Washington, D.C.
Aug. 2, 2002

APPEARANCES

FOR THE PLAINTIFF:

ROGER M. ADELMAN, ESQ.
DAVD BOOKBINDER, ESQ.
ALEX LEVINSON, ESQ.

FOR THE DEFENDANTS:

ANNE WEISMANN, ESQ.
JENNIFER PAISNER, ESQ.
CRAIG BLACKWELL
SHANNEN W. COFFIN, ESQ.

[4]

THE DEPUTY CLERK: Civil Case 01-1530, Judicial Watch, Inc. vs. National Energy Policy Development Group. Counsel, would you please identify yourselves for the record.

MR. KLAYMAN: Larry Klayman, Counsel for Plaintiff.

THE COURT: Good morning, Counsel.

MR. BOOKBINDER: David Bookbinder, Counsel for Plaintiff Sierra Club.

MR. ADELMAN: Roger Adelman, Local Counsel.

MR. ORFANIDES: Paul Orfanides, Judicial Watch.

THE COURT: All right, good morning.

MR. BOOKBINDER: Your honor, one thing. I believe on the phone is Alex Levinson from the Sierra Club in San Francisco.

THE COURT: All right, good morning, Counsel. He's not there yet. All right, we'll get him on in just a second.

Good morning. Hello?

All right, why don't you keep trying? We'll get him on soon.

Hello?

MR. LEVINSON: Yes.

THE COURT: Good morning, Counsel.

MR. LEVINSON: Good morning, your honor. This is Alex Levinson.

[5]

THE COURT: All right.

And for the government?

MR. COFFIN: Your honor, Shannen Coffin, Deputy Assistant Attorney General, Civil Division. With me is Anne Weismann, Jennifer Paisner, and Craig Blackwell.

THE COURT: All right, good morning.

Unlike the last case, there's no one smiling in this case.

MR. KLAYMAN: We're smiling, your honor.

THE COURT: You're smiling? All right, you're now smiling.

MR. KLAYMAN: Yes, we're smiling.

THE COURT: That's good.

All right, I'll hear from plaintiffs' counsel. I've reviewed your plans. Is there anything in addition to the proposed discovery plan that you wish to say?

MR. KLAYMAN: Yes, your honor.

THE COURT: All right.

MR. KLAYMAN: Your honor, Larry Klayman for Plaintiff Judicial Watch.

THE COURT: Good morning, Counsel.

MR. KLAYMAN: Good morning.

I'm just going to hit the highlights. I'm not going to belabor the points, because we set forth in the briefs [6] exactly what we feel the discovery plan should be. But your honor's order, which was very well thought out and very well reasoned, at page 52, really set forward the parameters of discovery, wherein you stated, resolving the constitutional questions, the issue of separation of powers, which has been raised by the

Defendants in this case, is premature at this stage of the proceedings. The government would have this court answer the question in the negative now and submit the case without ever providing any discovery into the nature and number of the meetings at issue, the identities of the participants, the nature of the group's interaction with the president, the role of the vice-president in the group, the nature of the alleged subgroup's interaction with the National Energy Policy Development Group, or the proximity of the, what I'll call the Cheney Energy Task Force and alleged subgroups to the president.

You set forth the parameters for discovery on page 52, your honor, and you added at page 70, *In re Sealed Case* makes clear that determining how far down the line the advisers' constitutional protection should extend in the context of balancing the needs of the executive branch and congress will be a fact-intensive inquiry. A fact-intensive inquiry determining who participated in the deliberations in the Cheney Energy Task Force and the alleged subgroups, whether in fact those subgroups existed and who interacted with the private [7] individuals involved, the role played by private individuals, and the number of meetings and interactions will affect this court's determination of the impact that revealing such activities to the public would have on the president's ability to perform his executive functions.

Furthermore, the role of the vice president in the Cheney Energy Task Force is to be determined. The fact that the vice president was tasked with leading the Cheney Eenergy Task Force does not mean that, in fact, he participated in all aspects of the task force or the meetings of the alleged task force subgroups.

Your honor then stated at page 74, any potential intrusion into the president's constitutional authority that occurs because a specific request for documents or information during the course of discovery must be analyzed as a conflict between the needs of the executive and judicial branches and will involve the application of different precedent.

So your honor was very, very precise in terms of how you wanted discovery to proceed here, and you set forth those parameters. The Plaintiffs in this case, Judicial Watch and Sierra Club, were very deferential to your honor's ruling, and we suggested starting with document requests and interrogatories which were tailored exactly to your order. It goes no further than your order.

However, rather than obeying your order, the [8] Defendants would want to reargue all the issues here, and they want to go down the primrose path of the AAPs decision, the health-care task force decision, with affidavits, and actually that's just going to create more work. It's going to slow things down. It's inappropriate because, obviously, we need the ability to get free-flowing information by witnesses themselves, not by lawyers. Affidavits are written by lawyers. The interrogatory responses are written by lawyers. But we just want to start with the documents and the interrogatories and see what they show, and then we'll come back to your honor and propose who, if anyone, should be deposed in this case.

Clearly, the approach that's being proposed by the Defendants, the Cheney Energy Task Force, is the type of bunker mentality. It's the type of an approach that we are above the law. We're above your honor's order. We don't have to answer questions. We'll put

forward what we want to put forward and nothing more. But your honor's already ruled and, consequently, this hearing is very straightforward. We have not asked for more than your honor ordered, and, in fact, we've taken a go-slow approach here, which we thought your honor would want us to do under the circumstances.

So, for that reason, we're confident your honor will allow us to serve the interrogatories and document requests to get this preliminary information within 30 days. This is a matter of great public interest. The energy task force is no [9] more immune from discovery than any other citizen or entity in this country, and we've already been through a lot of briefing here and a lot of analysis. Your honor did a very fine job in breaking down what the issues are at this stage of the proceeding, and for your honor to be able to make the rulings with regard to the various constitutional arguments, at a minimum, we need this information.

So that is our proposal: Document requests and interrogatories that fall within the scope of your order. Let's see what they yield. We'll then come back to the court and make a proposal and what, if any, depositions are necessary.

Thank you.

THE COURT: All right, thank you.

Anyone else?

MR. BOOKBINDER: Your honor, I think we would like to hear the government's explanation for their position before Sierra Club has anything further to add.

THE COURT: All right.

I'll hear from government counsel.

I gave the government a chance to provide the court with precise objections, and the government didn't take advantage of that opportunity.

MR. COFFIN: Your honor, our objection is general, and let me explain it. I think that the resolution of the [10] remaining issues in this case has to flow from your opinion, your opinion which held several things.

First, the resolution of the remaining issues have to be a tightly-reined process, and this call for narrowly-tailored factual resolution flows from two different related notions of constitutional avoidance. First, the one that your honor noted in the opinion, the resolution of the remaining issues, may be framed in a way designed to avoid unnecessarily deciding constitutional questions prematurely. I think we had issues with that at the time, but we certainly are willing to work with that notion in a discovery plan at this point and, or I should say in opposing the discovery plan at this point.

THE COURT: Well, essentially, the government's position is that you didn't file objections because no discovery is appropriate.

MR. COFFIN: Your honor, we believe that the APA frames a resolution of this case and—

THE COURT: Did I correctly say what the government's position is?

MR. COFFIN: I think at the beginning of our brief we say we object generally because this is an APA case, and in an APA case, the resolution of the case has to flow from the administrative record.

THE COURT: The government says, this is the record because we say it is the record and accept it, and you get no discovery.

MR. COFFIN: I think

THE COURT: Wait just a minute. Don't cut me off.

This is the record because we say it's the record, and no one is entitled to discovery because this is APA review. Discovery is frowned on. So, grant us summary judgment. I meant, that's the scenario.

MR. COFFIN: Your honor, that is APA review that you just explained. With all due respect, let me explain the basis for APA review in this case.

THE COURT: So the government wins because the government says, this is what happened. We say this is what happened, and no one can question what happened, and no one can even look into what happened.

MR. COFFIN: There was a decision made here. Both Judicial Watch and Sierra Club wrote letters to the government saying, for the following reasons, we believe FACA applies. We think you met with outsiders, etc. And the government made a decision that said, no, FACA does not apply, and as articulated in a letter that memorialized that decision from David Addington to Judicial Watch, they said the reason it doesn't apply is because there were no members, there were no members who were non-governmental employees.

I think that you have to start with the administrative [12] record that backs up that decision, and the administrative record that backs up that decision, first and foremost, is the memorandum that established the committee. Let me explain why that is so important, because, as in all decisions, all the disputes involving governmental decisions, there is a presumption of regularity, that the government complied with the law.

THE COURT: Wait. But if you're correct, it means that no one will ever have the opportunity to go behind the memorandum that creates the FACA Group and determine whether or not there was compliance with the law, if you're correct.

MR. COFFIN: Your honor, the presumption of regularity means this. We are very willing in this case, through sworn declaration, to confirm that the memorandum was followed, that regularity was the case here. Plaintiffs then should release all the information that they have publicly available, including all the FOIA documents that are out there. They should be required to come forward with something that rebuts that presumption of regularity.

Here, there is absolutely no evidence that Plaintiffs have put forth that anyone but governmental officials participated in the meetings of the NEPDG, and that is because the president said, you have to comply with my wishes, and it is only governmental employees that can be, government officials, I should say, that can be invited.

[13]

THE COURT: How do we know that everyone complied with the president's wishes?

MR. COFFIN: Your honor, again, the administrative record will back that up, and we are prepared to offer a declaration that confirms that. But unless Plaintiffs are willing to come forward with some shred of evidence that says that that is not the case, then, yes, this case should be over.

I think, I mean, I think in an APA review, it is possible for us to supplement the record to fully explain our reasons. I think *Camp v. Pitts* allows that, and we are

fully, we are willing to explain the rationale behind David Addington's letter to Judicial Watch that says FACA doesn't apply. We're willing to explain that, in fact, government officials were the only ones who participated in the meetings of the NEPDG.

THE COURT: Normally, as a general proposition, I would agree with you. In APA cases, discovery is normally frowned upon. The remedy is to remand to the agency, and if there's a need to supplement, then someone can prepare a supplemental record so that the court can review that record as opposed to embarking on discovery. But this case isn't the typical case, where you have a significant administrative record out there. I mean, you alluded to the memorandum that creates the subgroup, and that's it.

MR. COFFIN: The report of the president also confirms [14] the membership. On page five of the report, it says, here are the people who sign off on this report, because they're the ones who participated in its preparation. These are the members of the NEPDG de facto. So there is, in fact, an administrative record here.

And also, I mean, it's the facts that were relied upon by the decision-maker in saying FACA doesn't apply. Now, there may not be documents out there that back that up, but that's the purpose of the supplemental declaration here, to confirm in fact when we made this decision, we did so because in fact no one had attended these meetings and participated in the meetings themselves except governmental employees. So we're willing, your honor. I will freely admit that this is not your standard APA.

THE COURT: Absolutely. I appreciate that concession. Absolutely.

MR. COFFIN: Your honor, I don't think it's a concession. It's still an APA case. It's just not—

THE COURT: Well, why are you backpedaling from your admission? You're absolutely correct, and I think everyone in this courtroom agrees with you it's not the typical APA review at all.

MR. COFFIN: That's because you said—

THE COURT: Don't backpedal from it. I'm just applauding your concession.

[15]

MR. COFFIN: I'm saying it's not your standard APA review. I'm not saying it's not your APA-review case. It is, and that is because there was a conscious decision made by the government that FACA doesn't apply, because the president directed the composition of the group and the group complied with that composition. And when Judicial Watch and Sierra Club said, please comply. Please give us access. Please give us your documents and access to the meetings, the government said no, because in fact the facts before it were that no one had been involved in the meetings except the governmental officials. That's the purpose of a supplemental declaration in this case, and that's—

THE COURT: You would agree with me, also, that the law is not always complied with. Correct? People violate laws, unfortunately, every day.

MR COFFIN: Your honor, however, there is a strong presumption that the government complied with the law, and that is—

THE COURT: But the government doesn't always comply with the law.

MR. COFFIN: Your honor, I will admit there have been instances where that is the case—

THE COURT: Many instances.

MR. COFFIN: — But that presumption has to frame the inquiry here. If the government is coming forward and saying [16] in a sworn declaration that is part of the, quote, administrative record in this case that the law was complied with, because there were, I think what's out there right now, as far as I understand it, there were nine meetings, and that in each of those nine meetings only governmental officials were involved, then that presumption of regularity requires the Plaintiffs to come forward and say, but there's evidence out there that shows you didn't comply. And until we're able to put in a declaration and to file summary judgment and to frame these issues for you, and until they can come forward with some evidence that rebuts that, then I think that this case can't be resolved properly under the APA.

THE COURT: What you're suggesting, though, is that no one can conduct a reasonable investigation, reasonable discovery, in an effort to determine whether the law was complied with. That's all they're trying to do, to see if the law was complied with.

MR. COFFIN: I think they have a threshold burden here—

THE COURT: All right.

MR. COFFIN: —To rebut the presumption of regularity, and that threshold burden, if it can be rebutted, your honor, it should be able, they should be able to

rebut it through the information that is already out there. Judicial Watch has made FOIA demands, and they've been processed [17] entirely, I believe, except for, you know, documents that have been—

THE COURT: The document requests have been produced by the government which may be relevant in this case?

MR. COFFIN: Oh, absolutely, the document requests, the FOIA requests related to the operation of the NEPDG.

THE COURT: So there is relevant information out there?

MR. COFFIN: Yes.

THE COURT: That focuses on this inquiry?

MR. COFFIN: Yes. And in the FOIA cases, we've also put forward declarations that have explained each agency's operations within the NEPDG. So there is a lot of information out there, and what Judicial Watch—

THE COURT: Separate and apart from the administrative record?

MR. COFFIN: Oh, yes. No, I'm saying there's something from which—this is—I mean, in my mind, the presumption of regularity here says that they should look at all of that information, and if they can come forward with some evidence that someone, you know, a non-governmental official regularly participated in the meetings.

THE COURT: Well, that's all they want the opportunity to do. They're going to take that information and look through it and cull through it, but discovery is an ongoing process. [18] They want to look at other

information that may well lead to other discoverable information.

MR. COFFIN: But there was an administrative decision here, and the administrative decision is backed up by an administrative record that we're willing to supplement with that information and the information that they have here. If they can't show—

THE COURT: Why hasn't the government already supplemented that record up to this point? This case has been ongoing since last July. Why didn't they?

MR. COFFIN: Your honor, we haven't moved for summary judgment in this case. That's the only reason.

THE COURT: All right.

MR. COFFIN: We moved to dismiss—

THE COURT: Which was your right to do.

MR. COFFIN: —and we thought the case would be resolved on those issues.

THE COURT: I'm just asking the question. I'm not being critical.

MR. COFFIN: I think that's the reason. But, you know, I think it's important that your honor understand the difference between supplementation and discovery. I mean, as you know—

THE COURT: I'm well aware of the difference.

MR. COFFIN: Okay, and the case—

[19]

THE COURT: That's why I'm convinced that discovery will go forward, because there's a need, there's a crying need for discovery in this case.

MR. COFFIN: Your honor, the case that they cite, *AMFAC Resorts*, actually supports that.

THE COURT: Supports what?

MR. COFFIN: Supports the fact that discovery is not the norm in APA cases absent some showing.

THE COURT: I totally agree with you. In the typical APA case, it's not, but you've agreed with the court that this is not the typical APA case.

MR. COFFIN: Well, this is an APA case, your honor. Unless, unless the Plaintiffs or the court can articulate an accepted reason for varying the APA review in this case, then APA review has to be on the record, and there has been no strong showing of that bad faith or improper behavior, and in a case like this, discovery is simply improper.

THE COURT: Even though, as you recognize, this is not the typical APA case.

MR. COFFIN: Your honor, saying that this is not the typical APA case is not saying that this is not an APA case. The reason this is not a typical APA case, your honor, is that the threshold determination here is that the statute that the Plaintiffs are seeking on this relief here doesn't apply in the first instance.

[20]

THE COURT: What about the request for mandamus relief?

MR. COFFIN: Your honor, we don't think that changes the determination here at all. Mandamus is an extraordinary remedy. Your honor, you haven't decided whether mandamus applies here, because, as

you noted, there are constitutional issues that relate to mandamus.

THE COURT: Why aren't they entitled to some discovery, though, in an effort to convince me that mandamus may apply in this case?

MR. COFFIN: We would say that because it is a drastic remedy that's invoked only in extraordinary circumstances, where there's a clear and indisputable right, that unless the information that's out there, including the declaration that would be part of the administrative record and all the FOIA information shows some inkling of a right, no, they're not entitled to discovery to supplement that.

And, your honor, on the subject matter of the inquiry, because of your concerns with avoiding unnecessary constitutional questions, because of our concerns with disrupting the effective functioning of the presidency and the vice-presidency, we have proposed that we answer one question here, and that is one of the threshold questions that your honor posed in his opinion. That is the question of membership, and our APA declaration would focus on membership [21] in the group and it would confirm—

THE COURT: Are you prepared today to tell the court who the members of the group were?

MR. COFFIN: Your honor, it's my understanding—well, I'm sorry. Who they were?

THE COURT: I thought you said you were planning to file some sort of declaration to inform the Plaintiffs and the court who the members of the group are or were.

MR. COFFIN: Right. Your honor, we will do that.

THE COURT: Are you prepared to tell the court today who those people are?

MR. COFFIN: Well, I can read you the presidential memorandum

THE COURT: No, no. That's already a part of the record.

MR. COFFIN: —That establishes the group.

THE COURT: Are there any additional members?

MR. COFFIN: Yes. I think the director of the

(Pause)—

THE COURT: Who are the additional members?

MR. COFFIN: I'm explaining. The director of the OMB was a member. The vice-president had the authority to invite any governmental officials, any governmental officials to participate, I believe he extended that invitation to the Director of the OMB, who was not named by the president. There [22] was one other governmental official. Whether it was—I think the Secretary of State was an optional member. He may have been invited, but I'm not certain of that. But I am certain that as far as we understand the facts, which we would be willing to explain, that only governmental officials were involved. So it is the membership that was named by the president, with the invitation extended to the OMB Director to also participate.

THE COURT: And that's the complete list?

MR. COFFIN: Your honor, that is certainly what our declaration will show. That's my understanding, that that is the complete list.

THE COURT: So that's a complete list of participants?

MR. COFFIN: Yes, your honor. Those are the, those are all the members of the NEPDG, those who we are, we would show in the declaration. That declaration can be prepared, I think, fairly readily, within a few weeks, and we could proceed to summary judgment, I would think, within a month.

THE COURT: Why hasn't the government shared that information with the public up to this point?

MR. COFFIN: Your honor, the government has shared that information. There was a letter to congress, to Representative Waxman, from—I think it was actually an issue in one of our earlier hearings about that letter, but it did explain the membership. So that membership has been explained. [23] We would simply confirm that in a declaration, your honor.

And so, your honor, those are, that's the outline of an approach we would take, because this is an APA case. If, say, over our objection, you decide you'll allow, discovery in a non-APA setting, we would suggest, reluctantly, that you look to *Nader v. Baroody* for the framework of that. That is, in that case, Judge Gesell said we'll limit you to, the inquiry could be answered through the FOIA requests and through written interrogatories. So that is our, the alternative.

THE COURT: What about non-governmental-witness depositions?

MR. COFFIN: Your honor, non-governmental-witness depositions? If there were such depositions, we would certainly wish to be present. We would seek to preserve—

THE COURT: You're entitled to notice.

MR. COFFIN: —any privilege.

THE COURT: And invoke the privilege on behalf of the non-governmental witnesses?

MR. COFFIN: Invoke the privilege on behalf of the United States, your honor. The privilege, the privilege of executive communications belongs to the executive. But, your honor, as far as—

THE COURT: So if those witnesses were deposed, the government would attempt to invoke executive privilege?

MR. COFFIN: I don't know, your honor. I'm just [24] saying we would preserve the right. We would reserve the right to participate in any such deposition.

THE COURT: No, you're entitled to notice.

MR. COFFIN: And we would, but I want to make clear, our objections are to depositions in toto. We believe that this can be accomplished through written interrogatories that are sworn, and that should be the end of the story.

THE COURT: You may be correct. We're not going to focus on depositions today, but the court's not going to rule out the possibility of governmental officials being deposed, as well as non-governmental officials being deposed, but I'm not going to focus on depositions today.

MR. COFFIN: Your honor, let me just make one more point. I would suggest that, even though you have doubts about our plan, to allow it to go forward and then handle any objections at that point.

THE COURT: I've already invited the government to file objections. The court has again, and this is not the first time the government was invited, that the court has invited the government to frame appropriate constitutional objections. I did that during the briefing schedule, and the government chose not to do so, and in this case I said to the Plaintiffs, submit your proposed discovery—

MR. COFFIN: Your honor—

THE COURT: Just a minute. Don't interrupt me. [25] I told the Plaintiffs to submit a proposed discovery plan, and Plaintiffs did so. And I told the government, if you have precise constitutional objections, let me know what they are so I can determine whether or not this plan is appropriate, and, you know, essentially, you said, well, it's unconstitutional, without elaborating. You said, because Plaintiffs' proposed discovery plan has not been approved by the court, the Defendants are not submitting specific objections to Plaintiffs' proposed request. Well, there again, the government changes the rule. My rule was, if you have objections, let me know what the objections are, and you chose not to do so.

MR. COFFIN: Your honor, you asked us to object to the discovery plan, which is what we have done. We did not choose to offer written objections to their written discovery because you haven't approved the discovery plan.

THE COURT: Well, I'm going to approve it today. Discovery will go forward. So if there are objections, you can be precise and file your objections. Discovery is going to go forward. Anything further, counsel?

MR. COFFIN: No, your honor.

THE COURT: All right, I'll hear from Sierra Club.

MR. BOOKBINDER: Your honor, we'll be very brief. I think we've heard enough from the government on this [26] issue. I just want to say two things. One is—

THE COURT: Apparently, you would like to hear more, because you want to conduct discovery.

MR. BOOKBINDER: I meant in terms of their response to our discovery plan. One thing that became apparent is, now the government seems to be conceding there was a decision or determination made that FACA didn't apply at some point, which is interesting, because the government has argued repeatedly that there was no action, there was no final agency action, there was no determination made at any point, but now we have agency action conceded by the government. The second thing is that any administrative record would consist, obviously, of all the evidence that was, all the materials, all the documents, all the notes, all the minutes as to who participated, the exact same stuff that we're seeking in discovery, and finally the government stood here and said, as your honor pointed out, there is additional written material that they claim to have produced under FOIA which is relevant to this issue that they're not putting in the administrative record. So I don't understand what their version of the administrative record is. The last thing, your honor, is, we have already encountered claims of constitutional privilege in Defendants' answers to our complaint, which were just filed. I've never [27] seen a situation where an answer to a specific factual allegation contains, we refuse to answer on the ground of constitutional questions, and I'm not sure how Plaintiff should —I've never heard of facts being constitutionally privileged.

THE COURT: I have to ask the government whether or not the government has, indeed, invoked executive privilege, then, in its, answer.

MR. COFFIN: Your honor, there are points in the complaint where we will, we have refused to answer on the ground of (pause)—

THE COURT: Executive privilege?

MR. COFFIN: —On the ground that, yes, on the ground of privilege, on the ground of constitutionally protected communications, and, you know, we can deal with that in that process. But, yes, we have.

THE COURT: That's fine. I mean, if you wish to assert the privilege, that should be done clearly. Is that what you have done in your answer, then, asserted the executive privilege?

MR. COFFIN: Yes, your honor.

THE COURT: All right.

MR. BOOKBINDER: That's all, your honor.

THE COURT: All right.

All right, anything further, counsel?

[28]

MR. COFFIN: No, your honor.

THE COURT: All right, I'm going to take a five-minute recess.

Anything further, Mr. Klayman?

MR. KLAYMAN: No, your honor.

THE COURT: All right.

(Recess)

THE COURT: All right, counsel, I'm going to approve the proposed discovery plan that the Plaintiffs have submitted. It requires answers to interrogatories. It requires production of documents.

Let me just say one thing. I can see where all this is leading to. It's leading to more briefs, potentially constitutional issues. That's fine. That's well. If you want to assert privilege, then you may do so in the appropriate manner. But just to pick up on something that government counsel said at the podium, it may well be that the government's position is that it has produced in other lawsuits, pursuant to other requests, FOIA requests primarily, information that may be relevant in this case. The government cannot simply say it's already produced that information, whatever that information is, without providing the Plaintiffs and, indeed, the court with some detail, with some particularity, so that the court and the Plaintiffs know exactly what documents the government is referring to. So you [29] can't just simply say, we've already produced that information.

So I'm just giving you a heads-up on that, counsel. Although I don't think you would do that, it's very important. If it's the government's position that this information has already been produced in another forum, then it has to say in detailed particularity just what that forum is and what that information is.

I'm going to—well, let me just hear from Plaintiffs. I've approved your proposed plan, and when I say that, I recognize that there may be legitimate objections to the plan that raise constitutional concerns and that raise concerns of executive privilege. If so, we'll address those objections and concerns at the appropriate

time. When do you plan to propound your interrogatories and requests for document production?

MR. KLAYMAN: Your honor, we can do it today.

THE COURT: That's fine. You can do it anytime you want to.

I'll give the government 30 days from the date that the document request is propounded and 30 days from the date answers to interrogatories are propounded to file objections in the appropriate manner, and if the government asserts privilege with respect to a request for document production or interrogatory, then the government is going to have to, with precision, tell the court and tell the parties just exactly [30] what the basis of the objection is.

In other words, it's not appropriate to say executive privilege without more. It's not appropriate to say this request is unconstitutional, or pursuant to the constitution, no response is required. That's not appropriate. I need to know, for the third or fourth time, what the basis is for either a response saying this is protected by privilege or this intrudes upon some constitutional protections that should not be intruded on, and I'm not going to sit up here and tell the government how to respond to discovery. There are excellent attorneys at government counsel table. They know exactly what should and should not be done.

MR. KLAYMAN: Your honor, if I may propose a suggestion here.

THE COURT: Sure.

MR. KLAYMAN: The government has already had a good period of time to register its objections, as the court noted, to our discovery. That's why we actually

gave them an advance look at discovery, not just a plan, but we gave them the actual discovery. They have not done so. The way the case is usually run in this kind of a case when there's a matter of great public importance involved, when the government perceives a political downside to the production of documents, and that's obviously the case here or they wouldn't be fighting the way they are—

[31]

THE COURT: I'm not going to get into that. I don't know that to be the case.

Anyway, go ahead.

MR. KLAYMAN: At least from my perspective, and there was an admission made that they will produce some documents in other cases. What's before you here and what's different about this case from the other cases is that we're seeking the documentation at the core of the Energy Task Force right out of the White House. Those document requests that were propounded and FOIA requests were peripheral. They were in government agencies.

So what I'm proposing is, since they've already had some time to make objections, and they've obviously thought about what those objections would be in any event, to set a shorter time to make the objections—ten days, perhaps—so we'll know where we stand, to not let 30 days tick off and we'll lose all that time, because this is a matter of great public importance.

THE COURT: No, I recognize that. I recognize that time is a factor.

MR. KLAYMAN: That way, we can come in, if we disagree with those objections, and say, your honor, can you adjudicate that so we can have time for production?

Secondly, we would like a commitment from the government that they're not going to hang back to the end of 30 [32] days and then say, okay, we have this problem. You know we need another 30 days or another 60 days. This is the way it usually happens in these kinds of cases. We'd like to get an indication up front of what their problems are, if any, in the next ten days as they make their objections, so the court can address them, because the public is wanting to know what went on.

There was a statement made here that the Secretary of State was likely a member of the committee, the Task Force. The issue of how the energy policy affects even our Middle-Eastern policy is a matter that the public deserves to know about in terms of how this task force was constituted. We want to get the information out. That's our desire. As you know, at Judicial Watch, we don't take a position on energy policy. That's not our policy. We just want to get the information out to the American people.

So I suggest that—

THE COURT: I understand your concerns, and time is a concern of the court as well. I understand that. I'm going to give the government 30 days, though. Recognizing that the government has already had a significant amount of time to consider the proposed—questions and proposed document requests, it's not unreasonable at all to give the government until the 3rd of September to file, either comply with the request or

file its very detailed objections to document requests and/or [33] interrogatories.

And the reason, another reason for giving the government more time than less time is because I'm not inclined to extend that time, now, recognizing the government has already had an opportunity to consider the request for a significant period of time. So the 3rd of September is the date that the requests are due to the Plaintiffs' request for production of documents, as well as any answers to interrogatories.

And what I'm going to do, I don't know whether—

MR. COFFIN: Excuse me, your honor.

THE COURT: Yes.

MR. COFFIN: That assumes that Judicial Watch will file its request today.

THE COURT: Today. That's correct.

I'm going to—do you plan to do it today or tomorrow?

MR. KLAYMAN: Judicial Watch and Sierra Club will serve them today.

THE COURT: All right, that's fine.

This case is one of the electronic-case files, anyway, so it can be done electronically. That's only fair, to give the government until September 3rd, but I will not extend the time.

Now, I anticipate that there's going to be a need for [34] additional briefs to be filed. You know, I'm not ruling out the possibility of appointing someone to monitor discovery. I have a feeling that the objections and the responses to discovery could take an enormous amount of time of this court to resolve. So I'm not

ruling out the possibility of appointing maybe a retired judge to assist the court with managing discovery. To the extent that I can do it myself, I'll try to do it myself. But if it becomes too much of a drain on my time—this is not the only case on my calendar—then I will take appropriate action and appoint maybe even a magistrate judge or maybe even a retired federal judge to assist the court with monitoring discovery. But I'll try to do it myself for the time being.

I think it's appropriate to schedule a status hearing, yet still another status hearing now. I'm going to give the court a couple of weeks to—actually, I'm not going to need much time. I want to consider the objections that, I'm sure, will be filed to the requests for production of documents, as well as to questions. I do want to consider those so that I can then determine what's an appropriate briefing schedule to brief legal issues that will flow from the answers. I recognize time is a factor in this case.

How about Friday, the 13th, at ten o'clock?

MR. KLAYMAN: The perfect day, your honor.

THE COURT: All right, and that's for purposes of [35] putting in place an appropriate briefing schedule. I'm sure that one is going to be required in this case.

All right, anything else that we have to focus on today?

MR. BOOKBINDER: No, your honor.

THE COURT: All right, it's good to see everyone. You're not smiling. Everyone is frowning.

It's good to see everyone.

MR. KLAYMAN: Thank you, your honor.

THE COURT: Have a nice day.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendants identify and produce the documents described below at the offices of the Sierra Club, 85 Second St. 2d Fl., San Francisco, California, 94104, on 9/3/02, 2002, at 10:00 a.m. for inspection and copying

INSTRUCTIONS

1. The documents shall be produced by category as designated in this request, and each document shall be produced in such a fashion as to indicate clearly the identity of the file in which it was located. All documents are to be produced as they are kept in the usual course of business, so that plaintiff can ascertain the

files in which they were located, their relative order in the files, and how the files were maintained.

2. This document request extends to all documents in the possession, custody, or control of defendant and its agents, including, without limitation, documents located in all offices of defendants that were involved in the activities of the National Energy Policy Development Group or preparation of the National Energy Policy Report.

3. If you object to the production of any of the requested documents on the basis of privilege, you shall submit for each document, in lieu of it, a written description that:

a. identifies the date of the document;

b. identifies the author or source of the document;

c. briefly describes the nature of the document (e.g., letter, memorandum, handwritten note etc.) and the general subject matter of the contents of the document;

d. identifies the Person to whom the document was addressed, and each Person who received a copy of it; and

e. lists any objection raised or privilege claimed and its basis.

If any portion of a document for which you claim a privilege contains non-privileged information, you must produce the document but you may redact any allegedly privileged portion.

4. Any document, notation, or marking appearing on any document, and not a part of the original, is to be considered a separate document, and any draft, preliminary form, or superseded version of any document is also to be considered a separate document.

5. If any document required to be produced by this Request for Production has been destroyed, identify such document by:

a. author or preparer;

b. addressee and all other recipients

c. indicated or blind copies;

d. date;

e. subject matter(s);

f. number of pages;

g. attachments or appendices;

h. all persons to whom it was distributed, provided, shown or explained;

i. date of destruction;

j. manner of destruction;

k. reasons for destruction;

l. person authorizing destruction; and

m. person destroying the document.

6. If any document required to be produced by this Request for Production is withheld because it is stored electronically, identify the subject matter of the document and the place or places where the information contained in the document is maintained or stored.

7. Whenever the word "and" appears, the word shall include "or" and shall be the logical inclusive of "and/or."

8. The singular includes the plural, and the plural includes the singular.

9. Pursuant to Rule 34(b), F. R. Civ. P., these requests are continuing in nature and defendants are required to produce all responsive materials that come into their possession, custody or control after the date of their initial response.

DEFINITIONS

A. "Document" means and refers to, without limitation, all written, typed, or otherwise preserved communications including any letter, memorandum, diary, log, test, analysis, study, projection, check, invoice, receipt, bill, purchase order, shipping order, contract, lease, agreement, work paper, calendar, envelope, paper, telephone message, tape, computer tape, computer disc, computer card, other electronic media, electronic data active files, electronic data archived files, electronic data backup files, electronic file fragments, recording, videotape, film, microfilm, microfiche, drawing, account, ledger, statement, financial data, and all other writings or communications including all non-identical copies, drafts, and preliminary sketches no matter how produced or maintained in your actual or constructive possession, custody or control or of which you have knowledge of the existence, and whether prepared, published or released by you or by any other person or entity. Without limitation, the term "document(s)" shall include any copy that differs in any respect from the original or other versions of the document, such as, but not limited to, copies containing notations, insertions, corrections, marginal notes, or emendations.

B. "Person" means and refers to, without limitation, any individual, corporation, partnership, joint venture, limited partnership, association, trust, trustee, group, organization, government or government agency, office, bureau, department, or entity, and all divisions, sub-

divisions, bureaus, branches, offices or other units thereof, and includes the present and former officers, executives, partners, brokers, employees, agents, and all other persons acting or purporting to act on behalf of them, and any of their present or former parent corporations, subsidiaries, affiliates, divisions, predecessors and successors in interest.

C. "Communication" means and refers to any use of any mode of conveying meaning or information such as, but not limited to, speech, telephone, telegraph, e-mail, other computer-generated or transmitted information, letter, and any written or spoken language for the purpose of transferring information from one person or place to another. The term "Communication" shall include, without limitation, any oral, written or electronic transmission of information including, without limitation, meetings, discussions, conversations, telephone calls, memoranda, telecopies, telexes, conferences, facsimiles, seminars, messages, notes, or memoranda.

D. "Any" encompasses "all."

E. "Concerning" means and includes referring to, relating to, alluding to, responding to, connected with, commented upon, in respect of, about, regarding, discussing, involving, showing describing, reflecting, and constituting.

F. The "Task Force," means and refers to the National Energy Policy Development Group, as described in President George W. Bush's memorandum dated on or about January 29, 2001.

G. The "Report" means and refers to the Report of the National Energy Policy Development Group, titled "Reliable, Affordable, and Environmentally Sound En-

ergy for America's Future," and published on or about May 16, 2001.

H. "Sub-Group(s)" means and refers to Any working groups, including without limitation the Task Force Working Group chaired by Andrew Lundquist, the working groups established by each agency, and all committees, sub-committees, teams or other sub-groups that participated in the activities of the Task Force or the preparation of the Report, including without limitation working groups, sub-committees, team, or other sub-groups within any federal agencyor entity.

REQUESTS FOR PRODUCTION

1. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force.

2. All documents establishing or referring to any Sub-Group.

3. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of any Sub-Group.

4. All documents identifying or referring to any other persons participating in the preparation of the Report or in the activities of the Task Force or any Sub-Group.

5. All documents concerning any communication relating to the activities of the Task Force, the activities of any Sub-Groups, or the preparation of the

Report, between any person (excluding full-time federal employees) and

(a) the Task Force;

(b) any member of the Task Force;

(c) any staff or personnel of the Task Force;

(d) any Sub-Groups.

(e) any members of any Sub-Groups

(f) any staff or personnel of any Sub-Groups.

6. All documents concerning any communication relating to the activities of the Task Force, the activities of Sub-Groups, or the preparation of the Report between any person (excluding full-time federal employees) and

(a) the Department of Energy, or any employee or agent of the Department of Energy;

(b) the Department of Commerce, or any employee or agent of the Department of Commerce;

(c) the Department of Agriculture, or any employee or agent of the Department of Agriculture;

(d) the Department of Interior, or any employee or agent of the Department of Interior;

(e) the Department of Treasury, or any employee or agent of the Department of Treasury;

(f) the Department of Transportation, or any employee or agent of the Department of Transportation;

(g) the Environmental Protection Agency, or any employee or agent of the Environmental Protection Agency.

7. All documents concerning activities of the Task Force after September 30, 2001.

8. All documents concerning matters discussed in the January 3, 2002 letter from David Addington, counsel to the Vice President, to Henry Waxman, including but not limited to the October 10, 2001 meeting between a Task Force staff member and representatives of Enron Corporation.

Respectfully submitted,

/s/ SIGNATURE ILLEGIBLE
David Bookbinder (DC Bar No. 455525)
Sierra Club
408 C Street, NE
Washington, DC 20002
(202) 548-4598
Email: *david.bookbinder@sierraclub.org*

Roger Adelman (DC Bar No. 056358)
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 822-0600
Email: *Adelmarm@erols.com*

Attorneys for Plaintiff

/s/ _____
Larry Klayman (DC Bar No. 334581)
Paul J. Orfanedes
Judicial Watch, Inc.
501 School Street, SW
Suite 725
Washington, DC 20024

Attorneys for plaintiff Judicial Watch, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2002 a true and correct copy of the foregoing PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS was served via hand-delivery, on the following:

Roger Adelman (DC Bar No. 056358)
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Suite #730
Washington, D.C. 20036
(202) 822-060

Daniel Edward Bensing
U.S. Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
Room 818
Washington, D.C. 20530

Thomas Millett
Jennifer Paisner
U.S. Department of Justice
901 E Street, N.W.
Room 952
Washington, D.C. 20530

Richard D. Horn
Bracewll & Patterson LLP
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006-1872

Robert S. Litt
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20005

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009

/s/ MESEIDY RODRIGUEZ
MESEIDY RODRIGUEZ

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

PLAINTIFFS' FIRST SET OF INTERROGATORIES

Plaintiffs Sierra Club and Judicial Watch hereby request, pursuant to Federal Rule of Civil Procedure 33, that defendants respond to the interrogatories below by September 3, 2002.

DEFINITIONS AND INSTRUCTIONS

A. "Person" means and refers to, without limitation, any individual, corporation, partnership, joint venture, limited partnership, association, trust, trustee, group, organization, government or government agency, office, bureau, department, or entity, and all divisions, subdivisions, bureaus, branches, offices or other units thereof, and includes the present and former officers, executives, partners, brokers, employees, agents and all other persons acting or purporting to act on behalf of

them, and any of their present or former parent corporations, subsidiaries, affiliates, divisions, predecessors and successors in interest.

B. "Meeting" means and refers to any use of any mode of conveying meaning or information such as, but not limited to, speech, telephone, telegraph, e-mail, other computer generated or transmitted information, letter, and any written or spoken language for the purpose of transferring information from one person or place to another. When applied to the Task Force or any Sub Group, the term "meeting" includes all meetings of two or more persons where Task Force or Sub Group activities were discussed.

C. "Communication" includes, without limitation, any oral, written or electronic transmission of information including, without limitation, meetings, discussions, conversations, telephone calls, memoranda, telecopies, telexes, conferences, facsimiles, seminars, messages, notes, or memoranda.

D. "Participate" means any form of presence, observation, communication, or other involvement, including without limitation by use of telephone, computer, or video-conference, and including without limitation the submission of letters, reports, memoranda, or opinions.

E. "Any" shall be understood to encompass "all."

F. The "Task Force," means and refers to the National Energy Policy Development Group, as described in President George W. Bush's memorandum dated on or about January 29, 2001.

G. The "Report" means and refers to the Report of the National Energy Policy Development Group, titled "Reliable, Affordable, and Environmentally Sound En-

ergy for America's Future," and published on or about May 16, 2001, or any draft of this report.

H. "Sub-Group(s)" means and refers to any working groups, including without limitation the Task Force Working Group chaired by Andrew Lundquist, the working groups established by each agency, and all committees, sub-committees, teams or other sub-groups that participated in the activities of the Task Force or the preparation of the Report, including without limitation working groups, sub-committees, team, or other sub-groups within any federal agency or entity.

I. "Identify" means, with respect to an individual, state that person's full name, title, and last known business address and phone number.

J. Defendants are required to provide all information available to them at the time of their responses, regardless of whether the information is known to defendants, their representatives, agents, investigators or attorneys.

K. Pursuant to Rule 26(e) F. R. Civ. P., these interrogatories should be considered continuing, and defendants are required to update them if new information becomes available to them after their initial response.

L. If you object to responding to any interrogatory on the basis of privilege, please state the factual and legal basis for such objection.

INTERROGATORIES

1. Please state the dates, times, locations of, and identify all persons who were present at each meeting of the Task Force.

2. For each Task Force member, please provide a description of the member's role in the preparation of the Report and the activities of the Task Force;

3. Please identify all Task Force staff, personnel, consultants, employees, and all other persons who participated, in any manner, in the activities of the Task Force or the preparation of the Report.

4. For each person listed in response to Interrogatory 3, above, please provide:

a) A description of the person's role in the activities of the Task Force and in preparation of the Report.

b) A list of all meetings relating to the preparation of the Report and/or the activities of the Task Force in which the person participated, including the date and time of the meeting and identity of all persons who participated at the meeting.

5. Please list all federal agencies, offices, or other entities that participated, in any manner, in Task Force activities or preparation of the Report.

6. For each agency, office, or entity listed in response to Interrogatory 5, above, please:

a) Provide a description of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

b) Identify all persons who were involved with the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

i) For each person listed in response in Interrogatory 6(b), above, describe the person's role in

of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

ii) For each person listed in response to Interrogatory 6(b), above, please provide a list of all meetings relating to the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report, in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting;

7. Please list all Sub-Groups that participated, in any manner, in the activities of the Task Force and/or the preparation of the Report.

8. For each Sub-Group listed in response to Interrogatory 7, above, please:

a) describe the role or function of the Sub-Group in the activities of the Task Force and/or the preparation of the Report;

b) identify all persons who participated in the activities of the Sub-Group;

c) list all meetings of the Sub-Group, including the date and time of the meeting and the identity of all Persons who participated at the meeting.

9. For each Person listed in response to Interrogatory 8(b), above, please:

a) Describe the person's role in the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s).

b) list all meetings relating to the preparation of the Report, the activities of the Task Force, and/or

the activities of Sub-Group(s), in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting.

Respectfully submitted,

/s/ SIGNATURE ILLEGIBLE
David Bookbinder (DC Bar No. 455525)
Sierra Club
408 C Street, NE
Washington, DC 20002
(202) 548-4598
Email: *david.bookbinder@sierraclub.org*

Roger Adelman (DC Bar No. 056358)
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 822-0600
Email: *Adelmarm@erols.com*

Attorneys for Plaintiff

Larry Klayman (DC Bar No. 334581)
Paul J. Orfanedes
Judicial Watch, Inc.
501 School Street, SW
Suite 725
Washington, DC 20024

Attorneys for plaintiff Judicial Watch, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2002 a true and correct copy of the foregoing PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS was served via hand-delivery, on the following:

Roger Adelman (DC Bar No. 056358)
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Suite #730
Washington, D.C. 20036
(202) 822-060

Daniel Edward Bensing
U.S. Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
Room 818
Washington, D.C. 20530

Thomas Millett
Jennifer Paisner
U.S. Department of Justice
901 E Street, N.W.
Room 952
Washington, D.C. 20530

Richard D. Horn
Bracewll & Patterson LLP
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006-1872

Robert S. Litt
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20005

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009

/s/ MESEIDY RODRIGUEZ
MESEIDY RODRIGUEZ

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION

Pursuant to Rules 33 and 34, Fed. R. Civ. P., defendants submit the attached responses to plaintiffs' first set of interrogatories and requests for production. In this document, defendants submit their general objections to plaintiffs' requests. In the attached responses, each defendant responds separately to plaintiffs' inquiries and requests in accordance with the information known to each defendant and his/her agency, as well as

the documents within the possession, custody, or control of each defendant and his/her agency.[10]

As is fully explained in defendants' accompanying motion for a protective order, defendants object to these requests to the extent that they would require the Office of the Vice President and defendants within the Executive Office of the President to reveal information concerning the manner in which that office conducted its deliberations and developed recommendations for the President or the content of any such deliberations. See Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration at 6-18. Such requests unconstitutionally interfere with the constitutionally protected right of the President to receive advice in confidence and unduly interferes with the effective functioning of the Executive. *See id.*

For the reasons set forth in defendants' accompanying motion for a protective order, defendants object to discovery against the Vice President to the extent it is based upon plaintiffs' mandamus claim. *See* Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration at 19-21.

Defendants object to the scope of plaintiffs' discovery requests and to the undue burden imposed by them. The scope of plaintiffs' requests is broader than that reasonably calculated to lead to admissible evidence.

---

[10] Defendants acknowledge that the Court has previously indicated that it will entertain only specific objections to plaintiffs' requests. We have included in each defendant's responses objections which are specific to individual requests. We state our general objections here for purposes of clarity for the record and to preclude any later argument that, by not including them here, those general objections have been waived.

Defendants object to the instructions and definitions contained in plaintiffs' requests to the extent that they impose burdens greater than those imposed by the Federal Rules of Civil Procedure.

Defendants object to plaintiffs' definition of "meeting" as including any form of communication between two or more persons as an overly broad definition beyond the meaning of the term "meeting" as used in the Federal Advisory Committee Act, 5 U.S.C. App. § 10. Nongovernment individuals should be considered "members" of an advisory committee only if their "involvement and role are functionally indistinguishable from those of the other members. . . . If a 'consultant' regularly attends and fully participates in working group meetings as if he were a 'member,' he should be regarded as a member." *Association of Am. Physicians and Surgeons* v. *Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) ("AAPS"). Consistent with this definition of membership in an advisory committee, "episodic meetings between government officials and a consultant" would not serve to transform the consultant into a member of the advisory committee. *Id.* "When an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee." *Id.* Since any form of communication between two or more persons is not sufficient to implicate FACA, plaintiffs' definition of "meeting" is overly broad and unduly burdensome.

Defendants object to these requests as plaintiffs' cause of action arises under the Administrative Procedure Act, and review in APA cases is limited to the record absent a "'strong showing of bad faith or improper behavior' or when the record is so bare that it

prevents effective judicial review." *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). As plaintiffs have made no such showing, discovery is inappropriate in this case. *See* Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration at 18-19.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney
General

THOMAS MILLET
D.C. Bar #204405
CRAIG BLACKWELL
D.C. Bar # 438758
JENNIFER PAISNER
D.C. Bar # 472407
Attorneys, Civil Division
Department of Justice
901 E St., N.W.
Room 812
Washington, DC 20530
Tel: (202) 616-8268
Fax: (202) 616-8460

Supreme Court, U.S.
FILED
FEB 5 - 2004
OFFICE OF THE CLERK

(7)

No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX
VOLUME II

THEODORE B. OLSON
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

ALAN B. MORRISON
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

JAMES F. PETERSON
Judicial Watch, Inc.
501 School Street, N.W.
Suite 500
Washington, D.C. 20024

Counsel of Record
for Respondent

PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 30, 2003
CERTIORARI GRANTED: DEC. 15, 2003

TABLE OF CONTENTS

District Court Docket Entries, No. 01-1530 1
District Court Docket Entries, No. 02-631 8
Court of Appeals Docket Entries 10
Second Amended Complaint, Case No. 01-1530 16
Attachment 1:
Howard Fineman and Michael Isikoff, "Big Energy at the Table," *Newsweek*, May 14, 2001 43
Attachment 2:
Howard Fineman and Michael Isikoff, "A New Capitol Clash," *Newsweek*, Feb. 11, 2002 51
Attachment 3:
David Lazarus, "Memo Details Cheney-Enron Links," *San Francisco Chronicle*, Jan. 20, 2002 57
Attachment 4:
Michael Weisskopf and Adam Zagorin, "Getting the Ear of Dick Cheney," *Time*, Feb. 11, 2002 38
Attachment 5:
Letter from David S. Addington, Counsel to the Vice President, to Rep. Tauzin et al., May 4, 2001 71
Attachment 6:
Transcript of ABC News: *Nightline*, July 25, 2001 84
Attachment 7:
Decision of the Comptroller General Concerning NEPDG Litigation, Jan. 30, 2002 103
Attachment 8:
Letter from Judicial Watch, [illegible]. to The Hon. Richard B. Cheney, June 25, 2001 109
Attachment 9:
Letter from David S. Addington, Counsel to the Vice President, to Larry Klayman, July 5, 2001 123

Table of Contents—Continued: Page

Attachment 10:
Joseph Kahn, "Cheney Withholds List of those Who Spoke to Energy Panel," *The New York Times*, June 26, 2001, at A17 125
Express Wire Services, "Cheney Won't Give Up Names," June 26, 2001 128
Scott Lindlaw, "Congress Demands List of Participants in Cheney Energy Meetings," *AP*, June 25, 2001 130
Attachment 11:
Letter from David S. Addington, Counsel to the Vice President, to Rep. Henry Waxman, Jan. 3, 2002 134
Complaint, Case No. 02-631 139
Presidential Memo., Jan. 29, 2001 156
Plaintiffs' Proposed Discovery Plan 160
Defendants' Objections to Plaintiffs' Proposed Discovery Plan 166
Transcript of Status Hearing, Aug. 2, 2002 186
Plaintiffs' First Request for Production of Documents 215
Plaintiffs' First Set of Interrogatories 224
Defendant's Response to Plaintiffs' First Set of Interrogatories and Request for Production 231

Volume II

Declaration of Karen Knutson 235
Order, Sept. 9, 2002 242
Transcript of Omnibus Motions Hearing, Oct. 17, 2002 245
Defendant's Amended Motion for Certification Pursuant to 28 U.S.C. 1292(b) and for Expedited Consideration of This Motion 279
Defendant's Response to Order of Oct. 28 282
Transcript of Motions Hearing, Oct. 31, 2002 285
Order, Nov. 1, 2002 327

Table of Contents—Continued: Page

Notice of Appeal 337
Emergency Petition for Writ of Mandamus 339
Emergency Motion for Stay Pending Appellate Review 368
Memorandum Opinion and Order, Nov. 26, 2002 383
Petition for Rehearing and Suggestion for rehearing En Banc 416
Response to Petition for Rehearing and to Suggestion for Rehearing En Banc 447

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., ET AL., PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.,
DEFENDANTS

DECLARATION OF KAREN Y. KNUTSON

I, Karen Y. Knutson, hereby DECLARE:

1. I am a full-time employee of the Vice President of the United States appointed pursuant to Section 106 of Title 3 of the United States Code. My title is Deputy Assistant to the Vice President for Domestic Policy. From on or about February 6, 2001 to April 2, 2002, I was a full time employee of the U.S. Department of Energy (DOE) on assignment to the Office of the Vice President. Within that period, from on or about February 6, 2001 through September 30, 2001, my responsibility in the Office of the Vice President was to provide staff support to the National Energy Policy Development Group ("NEPDG"). My title when I performed

that responsibility was Deputy Director of the NEPDG. The NEPDG was created by a memorandum of President of the United States George W. Bush of January 29, 2001. At the end of the last day of fiscal year 2001, on September 30, 2001, the NEPDG ceased to exist by operation of that Presidential memorandum.

2. This Declaration is based on my personal knowledge and on information available to me in my official capacity.

3. Of the professional personnel in the Office of the Vice President who were responsible for providing the staff support to the NEPDG from February 2001 through September 30, 2001 I am the only one who is currently employed by the Vice President. Andrew Lundquist was a DOE full-time employee on assignment to the Office of the Vice President with the responsibility from February 2001 through September 30, 2001 to provide staff support to the NEPDG. His title during that period was Executive Director of the NEPDG. After the termination of the NEPDG on September 30, 2001, he was a DOE assignee, and then detailee, to the Office of the Vice President through March 26, 2002. On March 26, 2002, Mr. Lundquist left Federal Government service and at all times since then he has worked in the private sector. The NEPDG ceased to exist on September 30, 2001 and Mr. Lundquist ceased at that time to be the Executive Director of the NEPDG; therefore, when Mr. Lundquist left Federal Government employment, no one replaced him in his former capacity as Executive Director of the NEPDG.

4. As directed by the President in his memorandum of January 29, 2001, the NEPDG consisted of the following officers of the Federal Government: Vice President Cheney, Secretary of the Treasury O'Neill, Secretary of the Interior Norton, Secretary of Agriculture Veneman, Secretary of Commerce Evans, Secretary of Transportation Mineta, Secretary of Energy Abraham, Director of the Federal Emergency Management Agency Allbaugh, Administrator of the Environmental Protection Agency Whitman, Assistant to the President and Deputy Chief of Staff for Policy Joshua Bolten, Assistant to the President for Economic Policy Lawrence Lindsey, and the Assistant to the President for Intergovernmental Affairs. Additionally, in accordance with the terms of the Presidential memorandum of January 29, 2001, the Vice President invited the participation of Secretary of State Powell when the work of the NEPDG involved international affairs, and, as appropriate, the participation of Director of the Office of Management and Budget Mitchell Daniels. Finally, because the President had not appointed an individual with the title Assistant to the President for Intergovernmental Affairs, the Vice President invited, as appropriate, the participation of Deputy Assistant to the President and Director of Intergovernmental Affairs Ruben Barrales. The NEPDG consisted of these officers of the Federal Government, and no one else.

5. The above-named officers of the Federal Government, in their participation in the NEPDG, performed the functions set forth for them in the President's memorandum of January 29, 2001: to gather information, deliberate, and, as specified in the President's memorandum, to make recommendations to the President for a national energy policy. The Vice President performed the additional duties assigned to him by the President's memorandum of January 29, 2001 of presiding at the meetings of the NEPDG and

directing its work. On May 16, 2001, the Vice President, on behalf of the NEPDG, submitted to the President for his consideration the recommendations known as the Report of the National Energy Policy Development Group.

6. During the period of the existence of the NEPDG, the NEPDG was supported by five professionals employed by the Department of Energy who were originally assigned to the Office of the Vice President for the purpose of providing such support: an Executive Director of the NEPDG (Andrew Lundquist); a Deputy Director of the NEPDG (me); two Senior Professional Staff Members, and a Professional Staff Member. In addition, a White House Fellow assigned to the Office of the Vice President provided support to the NEPDG. This support staff for the NEPDG also had one staff assistant who provided clerical support. All of these individuals responsible for providing staff support to the NEPDG were full-time Federal employees.

7. The NEPDG met twelve times. The dates of the twelve meetings were: January 29, February 9 and 16, March 12 and 19, April 3, 11, and 18, May 2, 4 and 16, and July 13, 2001. All twelve meetings occurred in Washington, D.C. At the January 29, 2001 meeting, the President announced the formation of the NEPDG. Other meetings of the NEPDG may have been scheduled, but did not occur because they were cancelled or rescheduled.

8. Within the Office of the Vice President, personnel of the NEPDG support staff attended the NEPDG meetings as follows: the NEPDG Executive Director (Mr. Lundquist) attended all the meetings; the NEPDG Deputy Director (me) attended all the meetings, except

for the meeting on January 29, 2001; the senior of the two Senior Professional Staff Members attended approximately seven or eight of the meetings, but did not attend the meetings on January 29 and February 9, 2001; the junior of the two Senior Professional Staff Members attended one of the meetings; the White House Fellow attended all of the meetings, except for the meeting on January 29, 2001; the Professional Staff Member attended the meetings of April 3, 11, and 18 and May 2, 4 and 16; and the staff assistant who provided clerical support attended all of the meetings, except the meetings on January 29, February 9, and May 4, 2001.

9. Also, the following individuals employed on the Vice President's staff attended one or more of the NEPDG meetings: Chief of Staff to the Vice President, Deputy Chief of Staff to the Vice President, Counselor to the Vice President, Assistant to the Vice President for Legislative Affairs, Assistant to the Vice President for Domestic Policy, Deputy Assistant to the Vice President for Public Affairs, Deputy Assistant to the Vice President for Legislative Affairs (Senate), and the Press Secretary to the Vice President. These individuals at the time of their attendance were and still are full-time Federal employees, except for the individual who then was Press Secretary to the Vice President, who was at the time of her attendance a full-time Federal employee but who left Federal service on January 31, 2002 and is now in the private sector.

10. For each of the twelve meetings, the Office of the Vice President strictly limited those whom it invited to officers and employees of the Federal Government. The Office of the Vice President invited the officers of the Federal Government who constituted the

NEPDG, and invited each such officer to be accompanied by one employee of that officer's department, agency or office. On rare occasions, such an officer would be accompanied by more than one employee of that officer's department, agency or office. To the best of my knowledge, no one other than the officers of the Federal Government who constituted the NEPDG, the Federal employees whom they chose from their respective departments, agencies and offices to accompany them (all of whom were full-time Federal employees), and the Office of the Vice President personnel set forth above, attended any of the meetings.

11. The Presidential memorandum of January 29, 2001 establishing the NEPDG authorized the Vice President to establish subordinate working groups to assist the NEPDG in its work. The Vice President did not establish any such working groups.

12. The Executive Director of the NEPDG proposed in February 2001 the establishment of a detailed structure of targeted working groups on a series of subjects, with a subset of the departments, agencies and offices whose heads were on the NEPDG to constitute each such targeted working group, but that proposal was not implemented.

13. The Executive Director of the NEPDG also gave the label "Working Group," which sometimes was also referred to as the "Staff Working Group," to a collection of staff-level Federal employees with whom he worked in drafting the Report of the NEPDG. That staff-level group held numerous meetings regarding drafting of the Report. To the best of my knowledge, the only attendees at such meetings were full-time Federal employees of the departments, agencies, and offices whose heads constituted, with the Vice President, the

NEPDG, with one exception. The exception is that one individual, Joan C. O'Callaghan, doing business under the trade name The Communications Collective, was engaged to help provide technical writing and graphic design services relating to production of the NEPDG Report and attended brief portions of meetings—two or three, but not more than three—of the staff-level group as it worked on preparing the NEPDG Report; she did not participate in deliberations on or development of energy policy recommendations nor provide energy policy advice or recommendations, but rather provided technical writing and graphic design services in the preparation of the NEPDG Report. I do not recall how many meetings of the staff-level group occurred or precisely which employees attended, nor did the Office of the Vice President to the best of my knowledge keep records at such meetings that reflect such information.

14. It is my understanding that the plaintiffs in this lawsuit have alleged that the following individuals regularly attended and fully participated in the meetings of the NEPDG: the four individuals in the private sector who were named by Judicial Watch, Inc. as defendants in its Second Amended Complaint (see paragraph 25) in this lawsuit, other, unnamed, individuals who were private lobbyists, and other unnamed individuals who were energy industry executives. No such individuals attended or participated in any meetings of the NEPDG or the Staff Working Group.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Washington, D.C. on September 3, 2002.

/s/ KAREN Y. KNUTSON
KAREN Y. KNUTSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
DEFENDANT

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*,
DEFENDANTS

ORDER

The Court hereby sua ponte

ORDERS that plaintiffs shall file any detailed responses to defendants' motion for a protective order and for reconsideration by no later than **September 16, 2002**; and it is

FURTHER ORDERED that any motions to compel shall be filed by no later than **September 16, 2002**; and it is

FURTHER ORDERED that any replies to the responses to defendants' motion for a protective order and for reconsideration, and any responses to motions

to compel shall be filed by no later than **September 23, 2002**; and it is

FURTHER ORDERED that any replies in support of motions to compel shall be filed by no later than **September 25, 2002**; and it is

FURTHER ORDERED that the status hearing scheduled in this matter for **September 13, 2002** is cancelled, and the hearing is rescheduled for **September 30, 2002 at 11:00 a.m.** in Courtroom One; and it is

FURTHER ORDERED that no potentially dispositive motions shall be filed in this matter until further order of the Court.

IT IS ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
September 9, 2002

Notice to:

Larry Klayman, Esq.
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, DC 20024
Counsel for plaintiff Judicial Watch

Patrick Gallagher, Esq.
Alex Levinson, Esq.
Sierra Club
85 Second Street
San Francisco, CA 94104
Counsel for plaintiff Sierra Club

Anne L. Weismann, Esq.
Thomas Millet, Esq.
Jennifer Paisner, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Counsel for federal defendants

Howard M. Crystal, Esq.
MEYER & GLITZENSTEIN
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
Counsel for amicus NRDC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA-01-1530

JUDICIAL WATCH, INC., PLAINTIFF

SIERRA CLUB, NATURAL RESOURCE DEFENSE COUNCIL, AMICUS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

TRANSCRIPT OF OMNIBUS MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT COURT JUDGE

Washington, D.C.
October 17, 2002

APPEARANCES

FOR THE PLAINTIFF:

PAUL J. ORFANDEDES, ESQ
LARRY KLAYMAN, ESQ.
(by telephone)

FOR THE INTERVENORS:

ALEX LEVINSON, ESQ.
(by telephone)
DAVD BOOKBINDER, ESQ.
ROGER M. ADELMAN, ESQ.
SANJAY NARAYAN, ESQ.

FOR THE DEFENDANT:

JENNIFER PAISNER, ESQ.
SHANNEN W. COFFIN, ESQ.
CRAIG BLACKWELL

[3]

PROCEEDINGS

THE CLERK: Civil Action 01-1530, Judicial Watch, Inc., Sierra Club, Natural Resource Defense Council, versus National Energy Policy Development Group. May I have counsel identify themselves, please?

MR. BOOKBINDER: For the plaintiff Sierra Club David Bookbinder, with me are my colleagues Sanjay Narajay and Roger Adelman.

THE COURT: All right, good morning.

MR. BOOKBINDER: And on the telephone Alex Levinson.

THE COURT: All right. Mr. Levinson.

MR. LEVINSON: Yes, I'm here.

THE COURT: All right. And for the government?

MR. COFFIN: Your Honor, Shannen Coffin.

THE COURT: All right. And your colleagues, who are they?

MR. BLACKWELL: Craig Blackwelly, Your Honor.

MS. PAISNER: Jennifer Paisner, Your Honor.

MR. KLAYMAN: Your Honor, Larry Klayman on behalf of Judicial Watch on the line.

[4]

THE COURT: All right, Mr. Klayman, good morning. I'm not persuaded by the government's motion that I should reconsider my ruling, nor am I persuaded that I should grant the equivalent of the protective order.

Now, Mr. Coffin, I'll afford you a few minutes not much more than that though to convince me otherwise.

Now, in doing I'd like for the government as well as the plaintiffs to address this thought, and it's just a thought that I want to share with counsel, maybe the approach by the court at this point should be along the lines of the following. Maybe the court should direct the government to prepare the equivalent of a privilege log, submit it under seal for the court's consideration, along with whatever documents that the government is of the opinion are protected pursuant to whatever privilege is invoked and give the court an opportunity to determine whether the government's assertion of privilege is appropriate.

I guess that another approach would be for the court to appoint the equivalent of a Special Master, maybe a retired judge, and direct that the [5] government go through that procedure that I've just described with that Special Master affording the government's counsel an opportunity to appear before that person as appropriate and argue as appropriate in an effort to persuade the Special Master that the government's privilege, or privileges, that it has invoked are indeed permissible under the law. And then direct that Special Master to file a report with the court and I'd determine whether the privileges have been properly asserted and that there is a basis in law to support the privileges that have been asserted.

That was the approach that was followed by the court I believe, actually that was the approach that was discussed by the Circuit Court in the Gelands case. I'm not quite sure what happened when the case was remanded to the District Court.

I'm sharing those thoughts because maybe it is appropriate at this juncture for the court to carve out a middle ground since obviously battle lines have been

drawn and it appears that the government's position is clear that not only will the government produce discovery it won't respond to discovery requests and assert the privilege that everyone must assert.

[6]

Now, having said that, Mr. Coffin, I'd give you a chance to address those two thoughts as well as any principal point. I've considered your motion more than once, I've considered your arguments and I'm not persuaded by them, and I'm not going to give the parties, anyone, a great deal of time this morning to make their arguments that you've already made very eloquently in writing. I've already considered the arguments but if there is something that I've overlooked, Mr. Coffin, you need to tell me what it is and also address those two thoughts that the court has shared with counsel for the parties.

MR. COFFIN: Good morning, Your Honor. Thank you for continuing the hearing from last week to accommodate my schedule. I appreciate that.

THE COURT: Sure, no problem.

MR. COFFIN: Let me address your point. I don't believe that the middle that you've suggested actually is how Gelands proceeded because before it went through that process—

THE COURT: No, no. What I said was that's what the Circuit Court discussed. I don't know what happened when the case was remanded.

MR. COFFIN: I'm talking about the actual [7] Circuit Court decision. Before the court did that it satisfied itself that there was a need to do that, that there was

sufficient substantiation of the claims. And the court said there was a claim there—

THE COURT: Well I've already determined that discovery is appropriate.

MR. COFFIN: Well, Your Honor, we have complied with discovery to the tune of 35,000 documents.

THE COURT: You won't assert the privilege, you refuse to assert the privilege, although everyone, including the President of the United States, has to assert the privilege if that person is relying upon it.

MR. COFFIN: Well I don't—

THE COURT: The government takes the position that it's not going to assert the privilege, that it's not going to respond to court's order, that it's not going to produce anything nor will it assert the privilege because asserting the privilege is, as I understand your argument, unconstitutional.

MR. COFFIN: Let me say that—

THE COURT: I mean that's your argument.

[8]

MR. COFFIN: Yes. And there is abundant support for the procedure we're requesting. In *United States v Nixon* itself—

THE COURT: All right. Do you have any authority, sir, that is different from the authority that you've relied upon in your written pleadings because that written authority that you relied upon in your pleadings is not persuasive at all.

MR. COFFIN: Your Honor, the Poindexter case discussed this very point and Judge Green said I don't have to require a formal assertion of privilege which

itself puts a burden on the executive and the executive's confidentiality, I don't have to go that far before—

THE COURT: This court isn't requiring the government to produce privilege documents.

MR. COFFIN: No, but you're requiring us to perfect the privilege.

THE COURT: I'm telling the government that if you have the privilege then assert it and telling me the reasons why you're asserting it so that I can then determine whether your assertion of the privilege is appropriate or not. Everyone has to do that. Why should these defendants, who are [9] not Presidential defendants, be excused from doing what everyone else under the law has to do?

MR. COFFIN: Your Honor, the Vice President of the United States is the principal defendant in this case and I suggest to you that the concern for undue interference with the effective operation of the Executive Branch requires special treatment by this court in this context.

As the Clinton decision said that special caution is appropriate if the materials or testimony sought by the court relate to a President's official activities. There is no question that if executive privilege is implicated the President of the United States is implicated and these are documents that go to advice that was given to the President of the United States.

THE COURT: Well these defendants—let's assume a hypothetical, let's assume they're minutes of a meeting on a given day, the defendants before this court should not be put to the task of identifying that they are

minutes for a meeting that those minutes are indeed privileged and articulate the reasons why?

MR. COFFIN: Your Honor, one of the [10] standards that the court suggests in establishing need is that the evidence not be available—

THE COURT: Can you just answer my question?

MR. COFFIN: I am answering your questions. That the evidence not be available through due diligence from other sources, and there are now eight to ten agencies that are involved in this case that are not asserting any sort of executive privilege and are open to discovery in this case, and have in fact complied substantially with the discovery requests that are at issue in this case. So there are other sources.

And plaintiffs haven't come to you, Your Honor, and said in any way, shape or form that we've looked at those documents and we can't prove our case through those documents and that testimony.

And so, Your Honor, yes, that is exactly the case that if there is a way of proving who at the meetings, who was at any NEPDG meetings through other means the due deference to the executive requires this court to require that exhaustion of the plaintiffs. That is our position.

THE COURT: All right. Any new authorities that you want me to take a look at?

MR. COFFIN: Your Honor, we've cited all of the authorities in our brief. And I call your attention to the *Armstrong* decision, Your Honor. *Armstrong* is a very important case here because that involved the same sort of standards that we're asking for this court to apply in the context of a selective prosecution claim.

The court reasoned that a showing necessary to obtain discovery against the Executive Branch should itself be a significant barrier to the litigation of insubstantial claims and it did that for two reasons. First, judicial deference to the decision of executive officers stems from a concern not to unnecessarily impair the performance of core executive functions and, second, there is a presumption of regularity that is due to the conduct of government officials.

THE COURT: Well that's what you've been arguing since January of this year that there shouldn't be any discovery in this case.

MR. COFFIN: No, Your Honor, there is a substantial difference that you're missing, 35,000 documents and responses from me to the agencies, [12] that is a major difference in this case. It puts this case in a much different setting because plaintiffs have access to all of the information they need to prove their case and they don't have a single shred of evidence that anyone other than government officials were involved in the meetings of the NEPDG. There is not a single shred of evidence and that's the problem with their case.

You can't allow discovery here because there is no substantiation of the claim even though there are tons of sources for that information.

THE COURT: And still the government's argument is again there must be a need articulated by the plaintiffs before discovery can go forward?

MR. COFFIN: That's correct, Your Honor. That's correct, that is our position.

THE COURT: Well the reason why the government sought a protective order was because of your representation that you were about to file a motion for

summary judgment and you thought that there should be a protective order in place of your plan to file a motion, which I said you file until I resolve the discovery dispute. So, that factual predicate has been—

MR. COFFIN: But—

[13]

THE COURT: Just a minute, don't interrupt me. You have a habit of interrupting me, sir. You did this last year.

MR. COFFIN: I apologize.

THE COURT: I know. I invite advocacy but I will not tolerate attorneys interrupting me.

MR. COFFIN: Yes, sir.

THE COURT: All right, fair enough. I won't interrupt you.

Read that last line back.

(The statement was read back.)

THE COURT: I think that the request for a protective order was the government's desire to file a motion for summary judgment and I said no, don't file a motion for summary judgment unless or until the court resolves the discovery dispute.

MR. COFFIN: Right.

THE COURT: So that factual predicate having been removed then what is the factual predicate now for the government's assertion that it need not assert the privilege, that the plaintiffs have not established the need, is that essentially it?

MR. COFFIN: No, Your Honor, it's not. In [14]

my mind the summary judgment motion was a convenient vehicle for you to understand what the evidence—

THE COURT: A convenient vehicle for the government to proceed with and I said no, we're not at the summary judgment stage and we won't be at the summary judgment stage until I resolve discovery.

MR. COFFIN: Your Honor, as we said in one of our reply briefs we did say that we don't think that it was a necessary vehicle, it was simply a convenient vehicle. In our last reply brief we explained to you, we summarized to you, what the evidence was that was out there and that—

THE COURT: Well if that is the vehicle then it puts the burden on the plaintiffs to demonstrate a need.

MR. COFFIN: Your Honor, that is exactly right.

THE COURT: All right, fine.

MR. COFFIN: That is exactly right.

THE COURT: Answer the question then, the factual predicate then is that they haven't demonstrated need.

MR. COFFIN: Oh, that's exactly right, it [15] was just that the vehicle for doing that was to put in the context of a summary judgment motion. We didn't think that that was necessary and Your Honor, you know although we disagree with your not allowing us to file a summary judgment motion we don't think that it is a necessary vehicle. Certainly can be done here because plaintiffs have to demonstrate need.

THE COURT: All right. Anything new?

MR. COFFIN: Your Honor, I can move on to one of the—

THE COURT: I've considered the arguments that you've made in your brief and I'm not persuaded by them. Is there any new argument that you wish to make?

MR. COFFIN: Your Honor, there aren't any new arguments.

THE COURT: Thank you. I'll hear from plaintiffs counsel.

MR. KLAYMAN: Your Honor, Larry Klayman, good morning.

As occurred at the last hearing, that was the August 2nd hearing, we were concerned that the government, in this case the Bush-Cheney administration would allow the 30 days that Your [16] Honor ordered to produce documents or object with regard to the Cheney Energy Task Force itself, not the peripheral agencies that are involved but the Task Force itself, that it would allow that 30 days to tick off to try to delay this proceeding because it is apparent to us that what they are trying to do is get beyond an election period. We have no interest in the elections, the court has no interest in the elections, but we want the documents for the public as soon as possible.

It's been a year and a half since this matter was filed. At the current pace of the litigation nothing will be made available probably until after 2004 and this administration may no longer be in charge of the White House at that time.

My suggestion here is, and I think that Your Honor is touching upon it is that this Bush-Cheney administration and the defendant in this case is in a contempt situation right now. They have defied your order.

THE COURT: That's not an issue before the court, counsel. The only issues that I'm going to focus on today are the motion for reconsideration and the motion for protective order. I recognize [17] that there have been additional pleadings filed, those other matters are not before the court today.

MR. KLAYMAN: Okay. Well my point if that if Your Honor can set a short timeframe I think that's important because I believe the strategy of the government, and I've seen it in other cases here, is that whatever Your Honor orders in terms of a timeframe in or about the end of that time period they will be filing a petition for a writ of mandamus with the D. C. Circuit, it will not be meritorious but what they are going to try to do is to try and slow this matter down further.

So, consequently to keep the timeframe short if they are going to use that technique, however improper, and they've used it in other cases that we've been involved with, let them use it quickly so that we can get up to the D. C. Circuit and have this thing resolved, otherwise by the time that this case is litigated this administration will be out of office.

That's basically my observation. I agree with Your Honor's approach but I think that there needs to be a short timeframe for producing the documents, for producing claims of privilege.

THE COURT: All right, thank you, counsel.

[18]

MR. NARAYAN: Your Honor, I just want to address the two matters that you raised.

THE COURT: Sure, go ahead.

MR. NARAYAN: I refer to the privilege of producing a privilege log and documents under seal to the court. I certainly have no problem with producing reportedly privileged documents under seal. With regard to the privilege log and unprivileged documents we think that there is no need to place those under seal for two reasons. One reason is that at this stage I think we too are a bit concerned about delay here. What we've asked for in this case is a declaratory judgment and information and the value of those things does go down as the issues that we're investigating in this case get further and further into the past, and in particular as the administration's energy policy becomes something that is no longer—

THE COURT: So in other words you're suggestion along the lines of the court's thoughts would be for the court to essentially follow the procedures the court would follow in a FOIA case for instance, have the government produce a privileged log, which you would have access to but not necessarily the rationale behind the assertions [19] of privilege and the court would review those documents, those evidence materials, in camera. Is that right?

MR. NARAYAN: That's right, Your Honor.

And the other thing is that a privilege log would allow us to maybe structure further discovery in a way that might be useful to us.

THE COURT: Is there a requirement that the plaintiffs demonstrate a need at this point?

MR. NARAYAN: No, Your Honor, there isn't. Although the defendants have said a lot about the separation of powers and the constitution what we're

talking here about is production of non-privileged documents and the privilege log.

THE COURT: Which is what is required of everyone, is it not?

MR. NARAYAN: Yes, Your Honor. And those don't effect the functioning of the executive, they haven't shown any in which that could effect the functioning of the executive in any way that could possibly implicate separation of powers. And in all of the cases that they have cited and the cases that we've cited it's clear that any separation of powers the analysis focuses on functioning not the simple status of the fact that people have desks in [20] the White House, or at one point had desks in the White House.

In any event they say that we have access to other evidence, but until we know what we don't have it's very hard to say whether we can get those things from the agency or not. At a minimum here there is no intrusion on executive function in a way that would implicate separation of powers.

THE COURT: Because I'm not ordering the defendants to turn over any privileged documents whatsoever. I'm just telling them to turn over those documents that aren't privileged pursuant to the panoply of discovery rules that are in place. But for those items that the privilege attaches just tell me what the privilege is.

MR. NARAYAN: That's right, Your Honor, they haven't indicated a single specific document that the disclosure of which would effect the executive's functioning.

THE COURT: Well they haven't identified the documents.

MR. NARAYAN: Well, right, they haven't identified any specific documents at all.

THE COURT: They are essentially saying we don't have to respond to any discovery request and [21] we don't have to assert a privilege because responding to a request for discovery is as unconstitutional as well as providing discovery, if I understand their argument correctly.

MR. NARAYAN: I think that *Clinton v. Jones* adequately disposes of the contention that these simple steps of litigation somehow effect the executive in a way that offends separation of powers anyway.

THE COURT: If the court were to deny the request for reconsideration and deny the request for a protective order then what from the plaintiffs point of view?

MR. NARAYAN: Well then we wouldn't get any non-privileged documents and we'd get a privilege log.

THE COURT: And then the next step is what, the court would have to focus on the motion to compel, or is there a need to do that?

MR. NARAYAN: The motion to compel addressed the production by the agencies and they largely center on separate issues. I don't think that there is any reason to—at this point they are proceeding on separate tracks.

MR. KLAYMAN: Your Honor, to get back to [22] the earlier issue. This is Mr. Klayman.

THE COURT: Just a minute counsel. I want to hear from you but I want plaintiff's counsel, your co-counsel to finish. Can you hear, counsel?

MR. KLAYMAN: Yes. I thought that he was. Thank you.

MR. NARAYAN: The next step would be we intended this discovery to provide a foundation for further focus discovery based on what shows up here. So, the next step would be depending on what we see we might have follow up discovery requests. Again it's hard to say without knowing what is out there and we might also have some questions about the privileges that they are raising in their privilege log. In other words, we would proceed like any other normal civil case.

With regard to the Special Master, Your Honor, I think our only concern there is the potential there for delay again.

THE COURT: When I made reference to that procedure I wasn't by any stretch of the imagination finding as a fact, finding as a matter of law that there had to be a need demonstrated. I just focused on that procedure that was put in place, that's all. And so I guess when you're [23] thinking this through why would there be a need to have an intermediary step when in the final analysis the court would have to make the decisions in any event. And the court is most capable of making those decisions in the first instance and why burden someone else.

MR. NARAYAN: That's all that we have, Your Honor.

THE COURT: All right. Mr. Klayman.

MR. KLAYMAN: Yes, Your Honor. What I'm suggesting to clarify the earlier position, I realize that these other motions for show cause orders for contempt are pending but what we would ask for the court today

is a definitive order they comply with Your Honor's orders of August 2nd set a short timeframe, they are not going to comply with it in any event, they've made that clear.

THE COURT: Why is there a need for the court to issue another order? I issued one order. I mean is there a need for the court to issue another order, are you essentially saying I mean it this time? I don't think so, is there?

MR. KLAYMAN: I mean you want to go through the compel procedure. I thought that you were suggesting that he wanted an interim order to [24] comply is that's Your Honor's approach. I feel that they are in contempt right now, I agree with you.

THE COURT: Well, contempt is not an issue before the court.

MR. KLAYMAN: Well the Your Honor can decide on the motions at the appropriate time but I'm just concerned and I want to make sure that my position is stated clearly. I'm concerned that we need to know where we stand with regard to this Bush-Cheney administration, whether they are going to produce or whether they are going to claim privileges and not to allow time to tick off for them to then allow that time to expire, only to have them take what is in effect an appeal to the D.C. Circuit which will then shut this case down, you know, for six months to a year. We need to know where they stand right now and I think that we know where they stand. They do not intend to comply with your orders, they've told you that. They don't have any inclination to accept what they are at least with regard to the internal documents inside the task force itself and to give them, you know, a fourth bite of the

apple. I agree with what your is saying that you have already ruled, it [25] would not be appropriate.

So, yes, they've produced some documents and the documents that they've produced and not produced with regard to the agencies they should be what those privileges are. But with regard to the documents that they have just basically refused to produce or refuse to even claim privilege that issue in my view is beyond giving them a fourth bite of the apple and they should be ordered to produce them immediately. Quite apart whether you hold them in contempt they should be ordered to produce them tomorrow.

THE COURT: So in response the to question that I asked counsel what should be the next step for the court to take, assuming that the court denies the request for reconsideration and denies the motion for protective order?

MR. KLAYMAN: The next step should be with regard to the documents inside the task force. If they are not prepared to make a commitment today that those documents are going to be produced forthwith Your Honor would have to take appropriate measures to enforce the powers of the court quickly without allowing time to expire here. Their entire [26] strategy is delay, that's why it is, and that's why they are willing to thumb their nose in the face of the court. It's the same strategy used by prior administrations going all of the way back in modern times to Nixon.

And with regard to the documents from the agency where they have produced some documents albeit the same documents they produced in Judge Friedman's case and Judge Kessler's case they should have to produce forthwith a privilege log along with the proper

justifications for claims of privilege. But it's too late for the documents inside the task force, they are already in defiance of Your Honor's orders, they have waived objections, they can't raise objections now, it's too late.

THE COURT: Let me ask you this. I have not focused on those other two cases that are before different judges in this court, Judge Friedman and Judge Kessler, at what stage are those cases proceeding now?

MR. KLAYMAN: They are proceeding as a matter of course. I mean in effect those cases have now been merged into Your Honor's case because the Bush-Cheney administration—[27]

THE COURT: I wouldn't go that far.

MR. KLAYMAN: Well effectively, not technically. What they are claiming is that they have reproduced all of the documents in those other cases in the context of this case and there are motions pending in these other cases.

THE COURT: All right, let me ask you this then. In those other cases, and they are not related cases, in those other cases then the government has taken the position that it will not assert privilege but that further intrusion then is indeed unconstitutional, is that the stage those other cases are in?

MR. KLAYMAN: No. You see those are the agencies, these are FOIA cases, Freedom of Information cases. They are taking the position that we've produced everything that we have to produce save for those documents that we can withhold under claim of privilege. But those documents in the other cases don't get into the so-called belly of the beast which is the Cheney Energy Task Force itself centered inside the White House.

THE COURT: For those cases that the government has asserted a privilege, for those [28] documents that the government has asserted a privilege in those other cases has the government submitted those documents for in camera inspection to my colleagues?

MR. KLAYMAN: Not as yet. Various motions are pending in those cases including motions for contempt in those other cases as well. The point that I'm trying to make is you, Your Honor, have a highbred of that case and something unique here which is our seeking documents directly out of the Cheney Energy Task Force, not the agencies that are on the periphery but right out of the Task Force.

THE COURT: I understand. I was just asking just because I was curious.

MR. KLAYMAN: And that is why when Mr. Coffin makes the argument that we have everything that we need at best that is extremely disingenuous because we don't have the core documents about what went on inside the Task Force itself. Consequently their not having objected on September 3rd, or raised any claims of privilege, they've waived any objections or claims of privilege and they have to, no pun unintended, cough up the documents immediately. They are way beyond anything else at this point, any kind of argument. [29]

THE COURT: All right. It that it?

MR. KLAYMAN: That's it. Thank you, Your Honor

THE COURT: All right. Mr. Coffin.

MR. COFFIN: Your Honor, as far as waiver goes the executive privilege—the Supreme Court has made clear that the waiver of executive privilege is not likely inferred and we have in fact our intent to claim that if

necessary in this case. And we, of course, do intent to comply with any orders, final orders, of this court subject to appropriate appellate review.

THE COURT: Sure, sure.

MR. COFFIN: Your Honor, I mean—

THE COURT: Let's just be candid. If the court denies the request for reconsideration, denies the motion for protective order then what is next on this court's agenda, on this court's calendar?

MR. COFFIN: On this court's calendar you would have in front of you agency motions to compel. What the United States would is something that we would have to consider.

THE COURT: All right, that's fine. I just wanted to know. I think that the court should [30] then focus on the motion to compel and there was a reason why I didn't have all of those remaining motions compel, contempt, et cetera, et cetera, et cetera on the court's calendar for today. All right, thank you. Anything further?

MR. KLAYMAN: Your Honor, Mr. Klayman again.

THE COURT: Wait a minute, Mr. Coffin is at the podium, let me hear him.

MR. COFFIN: Your Honor, if you rule today we will have some housekeeping matters.

THE COURT: Let's get the housekeeping matters. Let's assume that I rule today, what are the housekeeping matters?

MR. COFFIN: There are several matters, one minor dealing with the motion to compel.

THE COURT: Well that's not really before me.

MR. COFFIN: No, it's not before the court. Our response is due on Monday and we would ask for a week extra which shouldn't effect your November 13th hearing on that motion.

THE COURT: I don't think that I'd have any problems with that but I'll hear from [31] plaintiffs as well.

MR. COFFIN: The issue of Andrew Lundquist as a defendant in this case is wholly separate from all of these other issues. It's a question of whether he is now a federal government employee. We've produced an affidavit that says he isn't and I'm sure—

THE COURT: And that has not been controverted, has it?

MR. COFFIN: It hasn't been controverted. We want to move to dismiss him from the case. You've told us not to file summary judgment pleadings. I'd at least like to—

THE COURT: Well that's a motion to dismiss though.

MR. COFFIN: And as you said before there is a factual issue of whether he's—

THE COURT: Have you spoken with your opponents about that?

MR. COFFIN: I haven't, I just knew that you had a summary judgment bar in place and so that is an issue.

THE COURT: Maybe that's an issue that we can resolve.

MR. COFFIN: And, Your Honor, the big [32] issue is, you know, if you go the way you saying we would ask orally today for a stay appeal.

THE COURT: All right.

MR. COFFIN: I'll discuss that if you rule.

THE COURT: All right. Mr. Klayman.

MR. KLAYMAN: Yes, Your Honor. There you have it, finally we have gotten a straight response and that's why this whole procedure up until now has simply been an exercise in delay, and that's why, Your Honor, I would urge you to issue an order that they produce the documents of the Task Force forthwith. Thank you.

THE COURT: All right, thank you, counsel. What about Mr. Lundquist, Mr. Klayman?

MR. KLAYMAN: Your Honor, I will certainly take that under advisement. I believe that he is a legitimate defendant. We have thought this through, so has the Sierra Club, but there is no motion pending.

THE COURT: Well sometimes issues can get resolved by agreement of counsel.

MR. KLAYMAN: Well, we'll take a look at it. Right now I'm in trial in Seattle and so as [33] soon as I get back I'll contact Mr. Coffin.

THE COURT: Let me hear from Mr. Coffin and then I'll give you a chance counsel. I'm sorry, you wanted to respond.

MR. COFFIN: I'm not sure what take a look at it means.

THE COURT: Why don't I do this, why don't I just direct counsel to meet and confer? You don't have to do it face to face.

MR. COFFIN: That's fine, we'll do that.

THE COURT: Just meet and confer about that issue, Mr. Klayman.

MR. KLAYMAN: Certainly, Your Honor.

THE COURT: You can talk over the phone about that.

Yes, counsel.

MR. NARAYAN: Just a few things, Your Honor. One is that if the court does proceed as it has indicated that it is going to I think that we'd like to know when the privilege log and privilege documents are going to be produce, and we would suggest a fairly short time frame.

THE COURT: Well the government has indicated that it doesn't intend to comply with the court's order and would seek a stay of the court's [34] order to consider its appellate options. Why shouldn't I—these matters are very important, why shouldn't the court grant a stay and give the government a chance to consider whether it wishes to file a notice of appeal?

MR. NARAYAN: Well, Your Honor, there is a circuit case right on point as to whether an appeal is appropriate here and the answer is that it isn't. In *In Re Executive Office of the President*, which is 215 F. 3rd 20, the Circuit Court specifically held that it doesn't have jurisdiction over an appeal of this nature where there is no claim of privilege and no threat that privileged documents are going to be produced as a result of the court's ruling.

THE COURT: Right, but that's not really an issue that I asked the parties to brief at all. I just wanted to ask the question anyway.

MR. NARAYAN: I guess again we are concerned about delay here and that's why we're asking for some sort of a timeframe as to how this is going to proceed.

THE COURT: All right. I'm going to take about a five or ten minute recess.

(Recess.)

[35]

THE COURT: The government's arguments are not new to the court, there has been nothing new to the court to persuade the court that its ruling in August is erroneous, therefore the court will deny the motion for reconsideration and deny the request for a protective order.

And again I reiterate all I'm requiring the government to do is to produce the non—privileged documents and for those documents that the government believes the privilege attaches to assert the privilege and provide an appropriate privilege log just like everyone else has to do.

Under the circumstances I think that it would be appropriate for the court to direct the government to produce the non-privileged information again by no later than two weeks from today, that's the 31st, and also to provide an appropriate privilege log by that date. The government has indicated that it would like a period of time in which to seek a stay of the court's ruling and I think that given an indication of how the government plans to proceed then I think that it is appropriate for the government to file a written motion for a stay and a shorter period of time. Since this is probably [36] not just a new consideration of the government I don't think that requiring the government to file its motion for stay by say noon on Monday the 21st

is unreasonable. And then I'll give the plaintiffs essentially three days, the 24th noon, that's eastern time, to file a response and any reply by the government should be filed by the 25th of October by noon. I'll schedule a hearing on the government's request for a stay on the 29th of October. Even though I'll be in trial I'll—I'll deal with that. The 29th of October at 10:00 for a hearing on the government's motion for a stay.

MR. KLAYMAN: Your Honor, Mr. Klayman.

THE COURT: Yes.

MR. KLAYMAN: I may be out of town that day. Is it possible to do it on the 30th or the 31st?

THE COURT: Well I've given the government until the 31st to comply with my order. I could do it the 30th I assume. You can participate by phone if you want.

MR. KLAYMAN: I may actually be in transit. If it is possible, if not I'll live with it.

THE COURT: No, no. I mean I'm going to [37] be in trial so let me just see what else I have.

MR. COFFIN: Your Honor.

THE COURT: Just a second. Is that a bad day for you?

MR. COFFIN: No, I'm concerned about the two days.

THE COURT: How much time do you need?

MR. COFFIN: Well it's the two days before the hearing and compliance.

THE COURT: I mean this is something that the government has been considering, isn't it?

MR. COFFIN: The briefing is not problem, it's the two days at the tail end. If you were to deny our motion to stay we would have two days to go to the Court of Appeals and get an emergency stay if necessary.

THE COURT: I wouldn't make anyone speed up to the Court of Appeals. Believe me if I deny it I'll do something that is going to accommodate not only the attorneys before me but also my colleagues in the circuit.

MR. COFFIN: Well given the schedule does it make sense then to set a 31st date for compliance with the order, that's my question, since either way—[37]

THE COURT: Well I can shorten the period of time. I want to give you more time to file a motion for a stay. I mean you can file it tomorrow, can't you? Do you have a copy with you today?

MR. COFFIN: No, I don't. I mean in part it depends on what you do so we don't have papers ready right now.

THE COURT: All right.

I mean what is fair? No one is going to have to run up to the Court of Appeals, I'm not going to do it to you, I'm not going to do it to my colleagues in the circuit. What were you suggesting? You said the 31st might—what are you suggesting, maybe another day or two, say the 5th for production of documents.

MR. COFFIN: Well that would give us enough time to—it would still be an emergency but we'd have more time to go to the Court of Appeals if necessary.

THE COURT: All right. That's fine. I can give the government until the 5th of November.

MR. COFFIN: Let me explain. Given our position in this litigation we have not done a document review of the Office of Vice President.

[39]

THE COURT: Well how do you know that privilege attaches then?

MR. COFFIN: Well we've done an initial review.

THE COURT: Wait a minute, wait a minute. That's a startling revelation, Mr. Coffin. You've not done—

MR. COFFIN: Your Honor—

THE COURT: No, counsel.

MR. COFFIN: I'm trying to finish sentence.

THE COURT: Will you let me finish my sentence, sir?

MR. COFFIN: I well.

THE COURT: You're a gifted lawyer as are the other lawyers but please don't interrupt me.

That is a startling revelation, that the government has not made a document review.

MR. COFFIN: Oh, no, no. I overstated my case.

THE COURT: Overstated. You're telling me that you haven't looked, how do you know—

MR. COFFIN: We haven't completed a document review of the Office of the Vice President. We certainly have done enough to [40] satisfy ourselves that the reasons for our argument attached.

THE COURT: The government is making these arguments in good faith?

MR. COFFIN: Oh, absolutely, Your Honor.

MR. KLAYMAN: Your Honor, the language of my opponent speaks for itself.

THE COURT: Wait a minute, one at a time.

MR. KLAYMAN: It's Mr. Klayman, I mean he made a plain statement, obviously he's backing off because it is bad press, but he made the statement that he made.

THE COURT: I'm not going to lose control. Go ahead Mr. Coffin. Mr. Klayman, you'll get your chance.

MR. COFFIN: Your Honor, we haven't completed the document review. We are aware that there are a number—

THE COURT: That's completely different from what you said originally.

MR. COFFIN: You're right, you're right, I'm sorry, I misspoke.

THE COURT: But you—

MR. COFFIN: I misspoke, Your Honor.

THE COURT: How could you misspeak about [41] something as important as that?

MR. COFFIN: By opening my mouth, it happens, Your Honor.

THE COURT: But counsel you're an officer of the court and I listen very carefully.

MR. COFFIN: We have not completed our document review and I'm concerned that two weeks may not be enough time, but having said that, Your Honor, the fact is we are going to—

THE COURT: I think at the very least the government had an obligation to at least complete the

document review. Certainly you've had than enough time. This case has been pending.

MR. COFFIN: Your Honor, may I speak, please?

Our point, Your Honor, has been that compliance with the order of the court imposes a burden on the Office of the Vice President. That is a real burden. If we had completed and done everything that Your Honor has asked us to do today that burden would be gone, but it would have been realized. So, the necessary part of our argument dealing with burden is that we're not going to ask our clients to complete that review. I mean that's the logical following from our argument. I know [42] that you've rejected it, Your Honor, but that is what we have been arguing.

THE COURT: Why is the court learning for the first time that the government has even completed a document review?

MR. COFFIN: Your Honor, we have argued to you that the burden of doing a document production is an unconstitutional burden.

THE COURT: That's completely different. Document production as opposed to document review, to review the documents to see whether or not privilege attaches or not. I'm differentiating there—

MR. COFFIN: I understand.

THE COURT: —between document review and document production.

MR. COFFIN: I understand.

THE COURT: You haven't done a document review.

MR. COFFIN: Your Honor, that perhaps is where I misspoke but we have done—

THE COURT: You say perhaps?

MR. COFFIN: Your Honor, please.

THE COURT: He's trying to find out whether you've completed—

[43]

MR. COFFIN: We have done a review.

THE COURT: All right.

MR. COFFIN: We have done a review, we haven't completed it, we haven't done everything necessary for a production. That's my point and I apologize for misspeaking, Your Honor.

THE COURT: You said it in your papers though. I understand your arguing your papers, document production would be unnecessary. You never said that even completing a review would be onerous, you never said that.

MR. COFFIN: Your Honor, that's part of the production. But we have—

THE COURT: Don't parties have to review documents before they can determine whether or not privilege even attaches?

MR. COFFIN: Your Honor, we have done that, we are satisfied with that.

THE COURT: All right. Now, what's onerous now, you only have two weeks to comply?

MR. COFFIN: No, Your Honor. I mean if after you issue a ruling on the stay, you're willing to revisit the date to give us time for a Court of Appeals ruling.

THE COURT: I'm going to be fair to the [44] government. I'm going to be fair to anyone appears

before me. I'm not going to require anyone to get on the elevator and run up to the fifth floor. I'm not going to do that.

MR. COFFIN: Okay, Your Honor.

THE COURT: I'll treat you fairly just like I would with anyone else. Any response to counsel's statements? Mr. Klayman.

MR. KLAYMAN: It's just that the statement of Mr. Coffin speaks for itself, it's a demonstration of the bad faith in this case.

THE COURT: All right. I gave the government until Monday to file its motion for a stay and that's by noon, and the plaintiffs until the 24th I believe I said. There is some flexibility, Mr. Coffin, not a lot but there is some flexibility. You've suggested the 5th of November for the date to comply with the court's order, is that correct, and a hearing in the preceding week to address the issue of a stay. Mr. Klayman, you said that you would be out of town the 30th. The 29th is fine or actually we can do it the 31st. If you want to do it the 31st that's fine with me.

[45]

MR. KLAYMAN: That's fine, Your Honor.

THE COURT: All right at—let me make sure that I don't have any motions hearings.

MR. KLAYMAN: I believe I have something at 10:00 a.m. so if we could do it in the afternoon.

THE COURT: I don't really have any problems with that, we'll do it at 1:00 in courtroom, it will be a hearing on the motion for a stay.

MR. COFFIN: Your Honor, I won't be here.

THE COURT: Well I'll accommodate you too now.

MR. COFFIN: I've got another major hearing on the 31st.

THE COURT: I mean you're the government's attorney, you've been arguing these. If you want the hearing on the 30th I'll give you a hearing on the 30th.

MR. COFFIN: Your Honor, I'm sorry. I'm arguing a case in front of Judge Bates that is of major significance.

THE COURT: It's more important than this case?

MR. COFFIN: No, sir. That's on the 31st [46] and to prepare for that I can't see doing two hearings in two days. I would prefer actually—

THE COURT: All right. I was more than willing to accommodate you.

MR. COFFIN: I appreciate that.

THE COURT: So the government will be represented on the 31st and that will be at 1:00.

Anything further, counsel? I'll issue an appropriate written order that essentially just memorializes my ruling on the denial of the request for a stay.

MR. KLAYMAN: No, Your Honor, thank you. Larry Klayman.

THE COURT: And the denial of a request for a protective order. I may not get that order issued today.

MR. COFFIN: Your Honor, I need a seven day extension on the motion to compel, our motion to compel response is due on Monday and we would ask for a seven day extension.

THE COURT: Any problems with that anyone?

MR. KLAYMAN: I didn't hear it, Your Honor.

THE COURT Mr. Coffin asked for a seven day extension on his motion to compel and there are [47] no objections by your co-counsel. I assume you have no objections having made requests for extension of time yourself.

MR. COFFIN: No.

THE COURT: All right. Mr. Coffin, I'd just ask that you submit to my chambers an appropriate order. You can e-mail it to chambers.

Anything further?

MR. NARAYAN: No, Your Honor, thank you.

THE COURT: Thank you very much. No one has to stand, thank you.

(Proceedings concluded at 11:20 a.m.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

DEFENDANTS' AMENDED MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b) AND FOR EXPEDITED CONSIDERATION OF THIS MOTION

Defendants Vice President Richard B. Cheney, the National Energy Policy Development Group ("NEPDG"), Andrew Lundquist, Joshua Bolten, and Larry Lindsey respectfully request this Court to certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), (1) its order of October 17, 2002 denying the government's motion for reconsideration and for a protective order; (2) its order of September 9, 2002, authorizing discovery and denying the government permission to file a motion for summary judgment; and

(3) its order of July 11, 2002, holding that FACA may be enforceable against the Vice President through the federal mandamus statute. The reasons for granting this motion are stated in the accompanying memorandum.

Defendants also request that this Court expedite briefing and consideration of this motion, so that it may be considered by this Court at its October 31, 2002 hearing, along with Defendants' motion for stay pending appeal. If necessary to accommodate this request, Defendants will waive any right to file a reply brief.

Counsel for the Defendants have conferred with plaintiffs' counsel regarding their request to expedite the consideration of this motion. Based on a miscommunication about the scope of Defendants' motion for interlocutory appeal, Sierra Club originally consented to expedited consideration of this motion. However, on review of the motion, Sierra Club requests that the Court pursue a normal briefing schedule. Judicial Watch opposes the expedited consideration of this motion.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE E. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

THOMAS MILLET
D.C. Bar #294405
CRAIG BLACKWELL
JENNIFER PAISNER
Attorneys, Civil Division
Department of Justice
901 E St., N.W.
Room 812
Washington, DC 20530
Tel: (202) 616-8268
Fax: (202) 616-8460

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

DEFENDANTS' RESPONSE TO ORDER OF OCTOBER 28

In response to the Court's Order of October 28 regarding the status of the production of documents by the November 5, 2002 deadline, defendants state the following:

1. Defendants have thus far identified 24 boxes of materials as potentially responsive to plaintiffs' discovery requests.[1] Those boxes have been reviewed for

[1] The documents in these 24 boxes had been previously identified, set aside, and preliminary reviewed after service of plaintiffs' discovery but were not processed for release for the reasons stated in defendants' motion for a protective order.

responsiveness. The documents identified as likely to be responsive from those boxes have been copied and bates-stamped. These documents are contained in approximately twelve boxes. Defendants are currently reviewing those boxes for privilege and are preparing privilege logs. Many of the documents contained in those boxes are single pages, requiring individual review and accounting of each page. As of this filing, approximately ten boxes remain for final review. Defendants are continuing to search for responsive documents and other documents may be added to this estimate.

2. In addition to hard copy documents, defendants are reviewing a quantity of approximately 10,000 emails retrieved from the email archive system. Because the retrieval system employs key words, not all of the emails identified by the search are responsive, requiring defendants to review each email individually. Defendants expect to complete this process within the next several days. Once the responsive emails have been identified, they must be printed, copied, and bates-stamped. Defendants expect that this portion of the email processing will not be completed until the end of this week. Once completed, the copies can then be reviewed and privilege logs prepared as appropriate. The total number of responsive emails is not yet known, but is likely to be several thousand. Because many of the emails consist of one or two pages, the review and logging process will be time intensive.

3. Defendants are devoting substantial resources to this effort. Thus, far eight attorneys are participating in the review process, and defendants expect to assign additional attorneys to the process. Defendants have also employed a contractor to provide high speed copy-

ing services, and to bates-stamp the hard copies. The contractor is also providing technical support in the processing of the emails. Based upon the review thus far, each existing box requires one to two attorney days to review and prepare a rough privilege log. Following that review, privilege logs must be finalized. Further, once the responsive emails are identified, printed, and numbered, defendants expect that the privilege review and logging process to be equally, if not more, time-consuming, due to the expected quantity of individual emails.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE E. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

THOMAS MILLET
D.C. Bar #294405
CRAIG BLACKWELL
JENNIFER PAISNER
Attorneys, Civil Division
Department of Justice
901 E St., N.W.
Room 812
Washington, DC 20530
Tel: (202) 616-8268
Fax: (202) 616-8460

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 01-CV-15309

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
DEFENDANT

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Washington, D.C.
Oct. 31, 2002

APPEARANCES:

For Plaintiff Judicial Watch:

LARRY KLAYMAN, ESQ.

For Plaintiff Sierra Club:

DAVID BOOKBINDER, ESQ.
ROGER ADELMAN, ESQ.
* SANJAY NARAYAN, ESQ.
* ALEX LEVINSON, ESQ.

For the Defendant:

SHANNEN W. COFFIN, ESQ.
CRAIG BLACKWELL, ESQ.
THOMAS MILLET, ESQ.

* Appearing by telephone.

PROCEEDINGS

[2]

THE DEPUTY CLERK: Civil Action 01-1530, Judicial Watch versus National Energy Policy Development Group. Will counsel please stand and identify yourselves.

MR. KLAYMAN: Larry Klayman for Judicial Watch.

THE COURT: Mr. Klayman.

MR. BOOKBINDER: David Bookbinder for Sierra Club.

MR. ADELMAN: Roger Adelman, local counsel for the Sierra Club.

MR. COFFIN: Shannen Coffin for the United States with Craig Blackwell and Tom Millet.

THE COURT: Good afternoon, Counsel. I just need to get a clarification first from the government. On the one hand, the government has filed a motion for a stay of the Court's orders pending appeal, and alternatively, if I understand your submissions correctly, the government has also requested additional time within which to complete its document search in preparation of a privilege log. I always thought it was the government's intent to not comply with the Court's orders so I need some clarification.

MR. COFFIN: They're alternative relief. If you were to give us the stay, Your Honor, I don't think we need to address the due date because the issue would be joined in the Court of Appeals. If you don't give us the stay, we would then go to the Court of Appeals to seek a stay. Having said that, [3] if we weren't to get a stay from this court, we would simply want some more time

from the November 5 deadline in the absence of a stay to complete the review.

THE COURT: That's where I'm confused, because I never thought it was the government's intent to comply with the Court's order. I guess I don't understand your request for additional time within which to complete your review of documents and then to prepare and file your privilege log if you don't intend to comply with the Court's order. I just don't understand that.

MR. COFFIN: I don't think that's—let me say this. There's always the option to go into contempt. We haven't made a decision that we're going to go into contempt, so we'd like to be able to try to comply with the order if we don't have a stay from this court or—

THE COURT: All right. I just wanted a clarification. So if I deny the request for a stay, the government is asking for additional time to complete its review of documents in preparation of its privilege log ostensibly in an effort to comply with the Court's order, is that correct?

MR. COFFIN: In absence of the stay, yes, Your Honor.

THE COURT: So in the absence of a stay, the government intends to comply with our orders then, is that correct?

MR. COFFIN: If we don't get a Court of Appeals stay, [4] I don't know what choice we have except for contempt.

THE COURT: Okay.

MR. COFFIN: I suppose that's an option, but we certainly haven't made a decision that we're not going to comply with your orders, Your Honor.

THE COURT: But you haven't complied with the orders, though, up to this point.

MR. COFFIN: Well, Your Honor, we've had a protective order motion in, and our reading of the civil rules of procedure is that that stays the obligation to respond to discovery. So it's simply we haven't complied yet because of the protective order motion. Now that you have ruled, we would seek appeal of that ruling, but if we're unsuccessful—

THE COURT: I haven't ordered the government to release any privileged documents at all. I haven't done that at all. All I said was comply with the order; if there are privileged documents, tell me what the documents are without prejudicing yourself.

You can tell me what the documents are in an appropriate privilege log, and I'll determine whether privilege is properly asserted or not. It's not as if I've ordered the government to turn over all the documents that the government contends are privileged. Indeed, the government told me last year it hadn't even completed its review of all the documents. That process is now in place though, is that correct, review of the [5] documents?

MR. COFFIN: Yes, sir, Your Honor. Can I step back to what happened at the last hearing? Because I just want to say that it was not clear from what I said, and I want to make clear that we certainly did enough to satisfy ourselves of the merits of our constitutional arguments. The boxes that we've had set aside have been set aside for quite some time. I do apologize to the Court for the confusion. But we had done enough to satisfy ourselves of the merits of that argument, but we certainly hadn't done the privilege log and the Bates

numbers and all the stuff that goes with a document production.

THE COURT: All right.

MR. COFFIN: But let me—

THE COURT: If I'm inclined to grant the government additional time to complete its review of the documents, how much time do you need?

MR. COFFIN: Well, Mr. Bookbinder and I have been speaking about that. I haven't spoken to Mr. Klayman this morning.

THE COURT: I'll hear from both of those gentlemen. My reading of their responses—I understand from their responses to my order was that Sierra Club has no objection to a reasonable period of time. Judicial Watch does have an objection.

[6]

MR. COFFIN: That's right. And what I've spoken to Sierra Club about, and at least we've come to an agreement, is that I believe three weeks from tomorrow would be the date?

MR. BOOKBINDER: The 23rd. I don't know where that fits.

THE COURT: What is today, the 31st?

MR. COFFIN: Today is the 31st, Your Honor.

THE COURT: Three weeks from tomorrow to complete your review and to do what?

MR. BOOKBINDER: Excuse me, Your Honor. The 22nd is a Friday. My apologies.

MR. COFFIN: Sorry. The 22nd. That makes sense.

THE COURT: The 22nd.

MR. COFFIN: This is what we would foresee going on here. We would be moving towards complying with your order, but we would also be seeing, if you were to deny the stay, we would be seeking to get a stay in the Court of Appeals. And that's sort of the—

THE COURT: All right, I understand. I think I understand what you're saying. All right. So if deny your request for a stay, then you will proceed—you're making representations you'll proceed with your documents search in an effort to comply with the Court's order, nevertheless availing yourself of your right to seek your stay in the Court of Appeals.

[7]

MR. COFFIN: That's correct.

THE COURT: And this is all separate and apart from the motion filed by the government for interlocutory appeal, which putting that aside for the time being, it's probably going to be moot. Let's assume I deny the request for a stay, which I probably will do, but I'll also —and I want to hear from other counsel as well—I'll probably grant your request for additional time. I'll probably do that based on your representations that you're reviewing in an effort to prepare a privilege log.

And by the same token, you're seeking a stay in the Court of Appeals, so you'll have some time. Even if I were to deny the motion for interlocutory appeal next week, you certainly have time between now and the compliance date to seek whatever you want to seek from the circuit. And our courts of appeal have said on many, many occasions, the prospect of proceeding with contempt in cases like this should be avoided, and I certainly have no intent to proceed along those lines.

So that's probably going to be a moot issue, interlocutory appeal probably, assuming I deny—the request for a stay, which I will probably do. I'll give you the time to comply with my order, and then you're free to seek whatever relief you want from the circuit then, correct?

MR. COFFIN: Your Honor, I'm hoping I have a chance to convince you to grant our stay, but if you were to deny the [8] stay—

THE COURT: Well, go ahead. I'll give you a few minutes. I've read your pleadings; I'm obviously very familiar with your pleadings, but if there's some principal point or points you wish to make in an effort to persuade me to grant your request for a stay, be my guest.

MR. COFFIN: Okay. Well, let's talk for a minute about the seriousness of the issues. I think that the legal issues involved in this case, I recognize that Your Honor has disagreed with us on these, but I don't think you've ever said that they're frivolous legal issues. As a matter of fact, at the last hearing you called these important legal issues.

THE COURT: It's an important case.

MR. COFFIN: I agree, and I think as a result, the issues that we present and we intend to appeal are certainly important and serious issues. So I think that first part of the stay standard, so the question then becomes about harm.

THE COURT: Now, that's an issue I want you to focus on, irreparable harm. It's not as if I've abused my authority and said to the government, turn over those documents, I don't care if they're privileged or not, turn them over right now and I'm not going to stay my

order. You could make a very compelling argument for irreparable harm under those [9] circumstances.

All I've said, though, consistent with precedent of law standing is to produce the nonprivileged documents, and indeed if there are privileged documents, prepare and file your privilege log. Indeed, I've said prepare and file it under seal for my eyes only or for the eyes only for a magistrate judge. But I wouldn't delegate; I would do it myself so that an independent determination can be made as to whether or not privilege can be properly invoked.

So I've not told the government to turn over privileged documents without any protection whatsoever, which would indeed be irreparable harm. The harm as I understand your argument to be, though, is the intrusion by the Court of requiring the government to even assert its privilege and to prepare a privilege log. That's an intrusion that I believe the government is of the opinion is unconstitutional.

MR. COFFIN: In the absence of a showing of compelling need.

THE COURT: And that's the irreparable harm then.

MR. COFFIN: Well, the irreparable harm would be if you accept our argument, which I know you haven't, but if you accept our argument that there is a constitutional harm in the absence of a showing of need to require us to submit to discovery under these circumstances, if we go up on appeal and don't have a stay, we've lost. I mean, we've lost our argument. We don't have an argument. You've effectively [10] mooted our argument because we'll have to comply with your order.

THE COURT: So then you're conceding then that you have no direct right to appeal then.

MR. COFFIN: Oh, no.

THE COURT: I'm sorry. We have some static coming from the telephone. Let's just see what's going on. Hello? Someone dialed in. Hello, Counsel.

MR. NARAYAN: Yes. I hear you, Your Honor.

THE COURT: Let's just get your names. How are you today?

MR. NARAYAN: Just fine, thank you. This is Sanjay Narayan and Alex Levinson with the Sierra Club.

THE COURT: All right. Good afternoon, Counsel.

MR. COFFIN: Your Honor, your question was whether I was conceding that we didn't have a right to appeal. No, not at all, but if we appeal in the absence of a stay, then we're going to have to comply with your order because it's a discovery order.

THE COURT: If I don't grant you a stay and I extend the time for compliance of my order to November 22 or 23, you certainly have time within which to request a stay from the circuit down here.

MR. COFFIN: Well, yes, we do.

THE COURT: Then you haven't lost your argument then, [11] have you?

MR. COFFIN: In that sense no, but why would this court require the Court of Appeals to make that determination when it's teed up for you to make? I'm not quite sure—I mean, it's the same argument we'd be making to the Court of Appeals.

THE COURT: Exactly, and often times—

MR. COFFIN: If the Court of Appeals would grant the stay, then that means that this court should grant the stay. And the only way we—

THE COURT: I guess the point I'm making, Counsel, I'm not foreclosing the Court of Appeals from granting you whatever relief the Court of Appeals wants to grant you; I'm just saying our rules require that you make the request for a stay in this court in the first instance, and there's times when district judges for reasons, various reasons, maybe a district court's view as a matter of law that the basis for a stay has not been persuasive, deny the request for a stay, which doesn't preclude a litigant from seeking relief in the circuit court.

And you certainly aren't laboring under any significant time constraints, because my order for compliance would be the 23rd or 22nd or whatever date is agreeable to the parties. You could in your leisure seek a stay from the circuit. So you're not without your remedy, don't you agree?

[12]

MR. COFFIN: I have to disagree in the sense that the issue—we would certainly have time to go to the Court of Appeals, but I don't think that's the issue. The issue that is before this court is whether denying a stay would effectively harm us.

THE COURT: Nothing's going to happen to you and your clients. This is not a scenario—I mean, I could envision a scenario that you're complaining of that doesn't exist, and that would be that the due date is tomorrow and the judge says I'm not extending this date and the government has to comply by tomorrow

and I'm denying your request for a stay. Then you're off to the circuit court, right?

MR. COFFIN: Yes.

THE COURT: All right. That's not the scenario that I'm talking about. I may be well inclined—in fact, I am inclined to grant you a stay based on your good faith representations that you want to continue with your search and that you want to prepare a privilege log. That's fine.

MR. COFFIN: You mean an extension, Your Honor.

THE COURT: Yes, an extension, I'm sorry. Thank you for correcting me. I'm inclined to grant your request for extension of time and then deny the request for a stay because I don't believe the standards for a stay are persuasive as a matter of fact or law, and that doesn't foreclose you from seeking your remedy in the circuit court unless I disagree with [13] you.

And then you say, Judge, then we're without a remedy then because then we have to comply with the order. You don't immediately have to turn over anything. You have three weeks within which to seek expedited consideration—well, you're a lawyer. I shouldn't tell you what those remedies are; you know what those remedies are.

MR. COFFIN: But Your Honor, the question here is not whether—it's not whether we could get a stay from the Court of Appeals. That would mean you would never have to grant a stay in any case.

THE COURT: Oh, no. We're not arbitrary, no. I mean I look at the—I mean I measure each request for a stay against precedent, *Holiday Tours* test is indeed the fountainhead case for determining whether or not a

basis exists for a stay; similar, if not identical to the standards for extraordinary legal relief in the forms of TROs and preliminary injunctions, and there are times when I will deny a stay and the Court of Appeals will grant a stay.

That's the way the process works. It may well be that I could deny a stay in this case and the Court of Appeals will grant it, but nothing onerous is going to happen to your client between now and the Court of Appeals—

MR. COFFIN: Let's just assume that the 22nd was the deadline here. I find it hard to believe that the Court of [14] Appeals would issue us final relief so that a stay would have to be granted by the Court of Appeals or by this court prior to the 22nd. So the question is really whether—the question before this court in the legal analysis is whether we need a stay to secure effective appeal, and we do, because there's no way before the 22nd that we're going to get our relief so that we'd have to by the 22nd comply with the order.

THE COURT: It's conceivable that the Court of Appeals may differ from this court's view about the need for a stay. If the Court of Appeals is of the opinion that a stay is appropriate, then certainly the Court of Appeals will—well, I can't speak for the Court of Appeals. It's very conceivable that the Court of Appeals would grant a stay before the compliance date.

MR. COFFIN: We believe that it will, because we think that we meet the standard for a stay here. With all due respect, I think there's—I think that there's a sense of abdication about that part of the standard here, because this court has to determine whether or not there's injury to the government. There would be an

injury to our argument in the absence of a stay if we had to comply with the order of this court pending an appeal.

THE COURT: All right. And the injury is the search process and the preparation of the log or turning over the documents?

[15]

MR. COFFIN: It's the entire process. It's both.

THE COURT: So that's the government's position, it's being injured then?

MR. COFFIN: We believe we are, but we're doing so out of good faith in order to comply.

THE COURT: And I appreciate that. I appreciate that. I think that's how the three branches of government should coexist. You disagree with the order you're complying with, and I appreciate that. And I think it's appropriate that the order is being complied with, and I'm most inclined to grant you additional time within which to continue to comply with the order. I understand what you're saying. I disagree with you as to whether or not as a matter of fact and law there is injury, a constitutional injury or an injury of the magnitude that you speak of. I would agree with you completely if I were to abuse my authority and say I don't care if these documents are privileged, turn them over, and if you don't, let the chips fall where they may. But I would never do that. I would never knowingly abuse my authority.

MR. COFFIN: But that's a matter of degree. Your Honor. It's not a matter of us showing irreparable harm. I mean—

THE COURT: No, I understand your argument.

MR. COFFIN: Okay. Well, there's an important point [16] I wanted to make about—

THE COURT: I thought that was the most important point.

MR. COFFIN: Well, there's harm to the plaintiffs as well.

THE COURT: All right. And the public interest. Don't forget that, now.

MR. COFFIN: The important point is that their argument is delay, that there's been a lot of delay and there's going to be more delay if you give a stay. Let me suggest, however, and this may require a little bit of explication, that there's not really a delay if in fact an appeal goes forward and we lose the appeal and then we have to comply with this court's order. Because if we do get to the point where we assert privilege in a privilege log, that's going to require a showing of need.

I think the only difference that this court has had with the U.S.'s position has been a matter of timing, and I understand you believe that to be a very serious difference. But there's no question that if we assert privilege, the presumption of the privilege arises and the plaintiffs will then have to show need, which means they have to show in part under the *Dellen* standard and under the *Emory Seal* case standard that the lack of availability of these documents from other sources, which means that the other discovery in this [17] case has to go forward and will be going forward.

So I don't really think that there's going to be—those resources have to be exhausted by plaintiffs before you can even get to the privilege issue. So I really don't think that they're really—I mean, they can talk about theoretical delay here, but in practical terms,

I don't think there's going to be much of a delay. So Your Honor, that's our position.

THE COURT: Let me hear from you with respect to the motion that's not before the Court, and that's the motion for the request for certification for interlocutory appeal purposes. Your motion's been filed. My recollection is responses have not been filed. I didn't put in place a briefing schedule. I should put that in place.

MR. COFFIN: I think their responses are due on Monday under the current schedule, but my colleague is going to want some more time. We've talked about it.

THE COURT: All right. Then I'll hear from plaintiffs in that regard, and I'll give you a chance to be heard again. Mr. Klayman?

MR. KLAYMAN: Your Honor, I think it's important because I'm going to ask Your Honor to set some times here, if Your Honor will grant my request, is to understand the context of this case. We sometimes lose sight of that. As lawyers before this court, we try to remain civil. We certainly have tried. My co-counsel and Your Honor's handled this in a very [18] admirable and gentlemanly way.

THE COURT: Everyone's been a gentleman before the Court. Everyone's been a gentleman and a lady before the Court. I invite zealous advocacy, so everyone's been most civil.

MR. KLAYMAN: Unfortunately, we have to look at the facts of what's gone on at this point in time. We're now well over a year into the case. The government has known all along, and when I say the government, this administration has known all along what it was going to do. They're big boys; we've seen it in many other cases.

They've known that they were going to try to take this appeal, if Your Honor grants it, in an interlocutory matter by certification, or they'll try a writ of mandamus. They'll take this issue to the appellate court, it will sit there for six to eight months at a minimum, it will come back, nothing will happen in the interim. If indeed we win, and we're confident we will win, then we'll just be starting out in the first round of discovery, which is simply finding out what the constitutionality was of this task force.

Once we complete that and Your Honor makes a ruling, they'll try to delay as long as possible. They'll try to take that up on appeal. When Your Honor rules that we should proceed beyond that point, if Your Honor does rule that, we'll be well beyond this administration, a tried and tested [19] technique which is used in many different cases. We've seen it in all of our different cases. That's why it's important to understand where we are.

Number one, Your Honor, they're already in a contempt situation. Your Honor issued orders of August 3 which required them to produce documents or object, and they defied that. We're in a contempt situation because it's now quite clear that they didn't even review documents. In fact, we're in a contempt/bad faith situation because they didn't even start their review, it's apparent from their affidavits and their pleadings, until after the last hearing. They have not been in good faith with this court.

And last but not least, Your Honor, and I don't say this lightly, we have filed a supplementary motion for contempt for an order to show cause. I have been personally threatened through intermediaries. I'm prepared to provide the names of the people who provided

that information; one a high-level informant who works with a government enforcement agency; another, someone well respected in town; statements made to the columnist, Robert Novak: What are we going to do about this Larry Klayman?

THE COURT: That's a collateral matter. I really don't want to get sidetracked on a collateral matter, but you know—

[20]

MR. KLAYMAN: Well, Your Honor -

THE COURT: Let me say one thing. It's important to you. You've made serious allegations, they're important to you, they're serious to you, and because of the severity of the allegations, I should probably refer those matters to the U.S. Attorney's Office, Roscoe Howard's office, and let him sort it out.

MR. KLAYMAN: Well, I think you should do both, Your Honor.

THE COURT: I have enough on my plate.

MR. KLAYMAN: The problem is, that is the Justice Department. You can pretty much figure out what the results are going to be.

THE COURT: He's an outstanding prosecutor, though.

MR. KLAYMAN: I would ask that you do both, and I would ask—and what those allegations are, as you may remember, is not just what are we going to do about Larry Klayman, and that was a Justice Department official to Robert Novak—

THE COURT: You're in fear of your safety, are you?

MR. KLAYMAN: I could be. I could be.

THE COURT: I'd just as soon refer that whole matter, Mr. Klayman, to the attention of the United States Attorney for the District of Columbia for whatever consideration his office wishes to give it. And that would not be the first time that I've referred serious matters that litigants before me take [21] very seriously. And because they take them very seriously, so do I.

But I don't have the resources of the prosecutor's office. I don't have investigators. I have two overworked law clerks, brilliant as they are. I just don't have the resources to get involved in investigating something of that magnitude as Mr. Howard does. I'd keep it here for the record, but I'd want to give them first opportunity to—

MR. KLAYMAN: Well, we recommended that Your Honor do both, so we'd welcome a referral, recognizing that that is the Justice Department, and 99.9 percent of the time—and I'm a former Justice Department prosecutor, proud to have been one at a different time -

THE COURT: Is that right?

MR. KLAYMAN: I am. I was with the Antitrust Division. I did civil and criminal. But the reality is, is that you know what happens when the Justice Department investigates itself. It's what happens when any entity investigates itself.

THE COURT: Well, if I thought that it would be a useless effort, I wouldn't do it. I have the highest regard for Mr. Howard.

MR. KLAYMAN: If you supervise it, Your Honor, I'll take your word for it.

THE COURT: Well, see again there's a fine line [22] between my job and the executive branch's job, and I would never attempt to supervise or oversee a criminal prosecution. I'd be happy to write a letter, and I will do so today, referring—and I'll attach copies of your motions—referring those matters to the attention of the U.S. Attorney's Office for whatever consideration that office wishes to give. If I get a letter back from Mr. Howard in 90 days saying, Judge, we don't plan on taking any action, then I'll take whatever further action is necessary.

MR. KLAYMAN: We're prepared to give you hard evidence.

THE COURT: All right. Save it for Mr. Howard.

MR. KLAYMAN: Let's see how they react.

THE COURT: That's fine. I think it's only fair to do so because I just don't have the resources.

MR. KLAYMAN: We had gone through this before with Judge Lamberth where he in fact supervised the Independent Counsel and the Justice Department with regard to Filegate matters and Chinagate matters, and he was calling them in for briefing sessions. In fact, we have a status conference in a week or so which will relate to some of those matters.

THE COURT: Maybe I should refer this matter to Judge Lamberth then.

MR. KLAYMAN: That would be fine.

THE COURT: Do you think he would agree to—

[23]

MR. KLAYMAN: I think you're both a lot alike. I respect and admire both of you.

THE COURT: Thank you very much. I have the highest regard for my colleague, but he's got enough on his plate as well.

MR. KLAYMAN: But it is a serious matter.

THE COURT: It is. You've made serious allegations. I don't take any allegations lightly, especially that an officer of the Court makes. I'm just being candid with you, Counsel. I just don't have the resources to delve into issues of that magnitude. Mr. Howard has an army of lawyers over there, and it's an outstanding U.S. Attorney's Office. And if I make the referral for whatever consideration, I'm sure they will not take lightly your allegations. I can't promise what the end result will be, but they're not going to take lightly a referral.

MR. KLAYMAN: As Your Honor says, let's see what happens, and we can take it up after, I would ask, 60 to 90 days.

THE COURT: Well, I'm not going to tell Mr. Howard —I'm not going to tie his hands for 60 to 90 days. He's a professional. He'll treat it in a professional manner. Let me ask you something.

MR. KLAYMAN: The point I'm making—

THE COURT: Let me ask you something, though. I want to get back to request for a stay. I know you oppose their pleadings. I know you oppose it. I'm inclined to grant the request for additional time because the government is, in my view, in good faith complying with my order.

They're reviewing the documents, they're preparing a privilege log, and I think it would be an abuse of my authority to say to the government under those circumstances, no, I'm not going to give you a date. That

would not be the correct decision to make. So I'm inclined to do that.

Do you agree or disagree, though, with Mr. Coffin when he says if I give the government additional time within which to ostensibly comply but nevertheless deny the request for a stay that indeed their appellate possibilities are foreclosed? Do you agree with that?

MR. KLAYMAN: No, I don't agree with it. They don't have any appellate possibilities. This is a discovery issue, and there's none to begin with, and all they're trying to do is run out the clock. And as I've said, Your Honor, we've seen it before. I can assure you if you were to order them to produce internal documentation as to when they made the decision to pursue this strategy, you would find out—

THE COURT: I'm not going to do that.

MR. KLAYMAN: —you would find out that it was well over six months to a year ago that they knew exactly what they were going to do. They've succeeded. They've won. They've [25] gotten beyond these elections, and they'll get beyond the next elections too. And that's not our concern.

But even of the meager documents that we have so far—some are produced through the FOIA process —one sticks in my mind, and this is what they're scared about: a letter from the Chevron Corporation to the administration saying let's end the embargo on doing business with Libya, a state on the terrorist watch list before 9/11. There's stuff like that out there, and that's why they're running out the clock.

It's not just a question of energy policy; it's a question of national security in terms of how they're perceived to react to our national security, not anything

that's classified, but to simply how this administration has allowed energy policy to conflict with its war against terrorism. That's what they're concerned about, and that is not our concern.

Our concern is to get the information out to the American people so they can make their own decision. Like Fox News says, "We report; you decide." We've never taken a position on energy policy. What I'm saying here is I believe that what we should do right now is to set November 13, which you currently have. I realize you've just now referred my request for contempt for threatening me to the U.S. Attorney's office, but there's the other contempt issue—and they are in contempt—and we should have a hearing on that on November 13 for having defied at a minimum your orders of August 3.

[26]

The Court needs to put its foot down. It can't permit this kind of conduct. They think they have your number, in all due respect, because you are a gentleman and because you are trying to be as agreeable as possible, but this court has been flouted.

It's been disrespected, and it's time for the Court now to send a message to this administration that we're not going to allow court orders to be defied anymore, and we represent the people of this country, not the vested political elite that simply want to keep information away from them because it's election time.

So we ask that November 13 be a date for the hearing on the order to show cause with regard to the defiance of the Court's August 3 orders.

THE COURT: All right.

MR. KLAYMAN: Thank you.

THE COURT: Thank you, Counsel. Yes.

MR. BOOKBINDER: Good afternoon, Your Honor.

THE COURT : Good afternoon, Counsel.

MR. BOOKBINDER: I'll be very brief. I just want to address the two issues of irreparable injury and success on the appeal. Briefly, no court has ever held that simple preparation of a privilege log and turning over of nonprivileged information is irreparable injury. The defendants haven't found such a[27] case, we haven't found such a case, no one's ever heard such a case. So as far as we can tell, there simply is no irreparable injury.

Second, on the issue of success, defendants' theory is simple participation in the discovery process is a separation of powers problem; it violates the separation of powers theory. In *Clinton versus Jones*, the Supreme Court was so crystal clear on this point, and I don't like to quote things because we all read them, but I'm just going to quote one sentence out of *Clinton versus Jones* where we're talking about documents in deposition and trial testimony of a sitting president, and the quote is:

"The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the chief executive is not sufficient is to establish a violation of the constitution." Period.

That's testimony from a sitting president in a civil matter concerning issues before his presidency. That, the Supreme Court held, did not raise separation of powers concerns. Therefore, we think production of

nonprivileged documents and a privilege log from the vice president and officers in the White House simply comes nowhere close to that standard. And that's all, Your Honor.

THE COURT: All right. What about the issue of stay and the discussion I had with Mr. Coffin? I'd be interested in what your views are. Mr. Coffin's views are that indeed the [28] opportunity to appeal be foreclosed unless the Court granted a stay. I disagree with that, but maybe he's correct. And if you agree with his statement, then I need to rethink this whole issue of potentially denying a request for a stay and ordering a date for compliance in the future. My view is that the government would certainly have an opportunity to seek relief from the circuit and not be under any due date unless they wait until after the 23rd of November or 22nd of November.

MR. BOOKBINDER: Your Honor, we agree a hundred percent. As a matter of fact, Mr. Coffin and I were working off a makeshift calendar to make sure we were going on the assumption that as the Court has been inclined to do, it has been ruling from the bench.

Mr. Coffin and I were thinking that perhaps they would make their stay motion to the Court of Appeals by tomorrow. We figured on perhaps a week for the Court of Appeals to rule on that, and then two weeks after that we'd wind up at the 22nd. I don't think there's any foreclosure of the appellate relief. We're not here to force the government into a contempt situation.

THE COURT: Nor am I. Nor am I. That's not the way the system should work at all. In fact, I'd be inclined to grant the government more time in which to

comply in an effort to assist the government to seek a stay in the Court of Appeals. That's the way our government works. I'm not going [29] to force anyone into a contempt citation.

And this is not a scenario where compliance is due tomorrow and someone has to get on the elevator and speed up to the Court of Appeals and then my colleagues in that court have to stop everything they're doing. I don't want to make anyone's life miserable. I don't plan on doing that by any stretch of the imagination.

MR. BOOKBINDER: Your Honor, there are two minor scheduling things again.

THE COURT: Wait a minute. Before you say that, though, let me just say I don't intend to write any more. I've written two or three orders. I don't think I need to say anything if I'm inclined to deny the stay. I think I need to find as a matter of fact and law the standards for a stay opinion review have not been met, have not been satisfied by the plaintiffs, but I don't plan to write another lengthy opinion. I don't think a need exists. Do you think the Court needs to say anything more about its views regarding the discovery dispute?

MR. BOOKBINDER: No, Your Honor. I don't think anything more needs to be written.

THE COURT: I don't either. All right, I'm sorry. You were about to mention two scheduling issues.

MR. BOOKBINDER: Yes. In terms of scheduling, since there's so many motions and matters flying around here—

[30]

THE COURT: And also I'm in trial. I'll be starting the second week of probably, I don't know, a three week trial. It's a multi-codefendant case. That's a factor that wasn't apparent some time ago because I didn't know that the case was going to go to trial. I thought that—well, anyway, we're in trial and we're going to be in trial.

MR. BOOKBINDER: Is the November 13th hearing still expected to go forward on the—

THE COURT: That's a very good question, and in all candor, it should go forward. I anticipate the government concluding its case in chief in my criminal matter Tuesday at the latest, and Tuesday would be the 5th. Looking down the road, Counsel, it's difficult to predict, but I think that Monday the 12th I'll probably be instructing a jury, I think. With a little bit of luck it will be on the 8th. So the hearing scheduled on the 13th is still on my calendar. I still plan to proceed with that hearing.

MR. BOOKBINDER: Thank you, Your Honor. Currently plaintiff's replay on their motion to compel is due Monday the 4th, and we would like an extension till Thursday the 7th and Mr. Coffin indicated he did not have—

MR. COFFIN: That's fine, Your Honor.

THE COURT: I'm sorry. What document is due on the fourth, Counsel?

MR. BOOKBINDER: Our reply brief on the motion to [31] compel is due on the 4th, and we'd like to move that to the 7th.

THE COURT: That's fine with me.

MR. BOOKBINDER: And in addition, our response to the 1292 (b) motion is also due the 4th, and we'd like to extend that to the 7th as well, Your Honor.

THE COURT: I have no problems with that. And for the government's reply to that? I assume the government —

MR. COFFIN: Well, we have some timing issues about the appeal that—

THE COURT: All right. I'll give you a chance. I'm sorry, maybe I should have heard—I can invite all three of you to the podium. It's big enough and safe enough for the three of you to be up there at one time.

MR. COFFIN: Your Honor, there are timing issues. As you know, we're not seeking simply 1292(b), but we would also, if you were to deny that, we would go up on a couple of other theories. One of them is a *Nixon* 1291 appeal, and the timing of that, we have to seek—in order to be timely, the 60-day rule applies. By our calculation, there's an order of September 9 that would be part of this appeal, and November 8 would be the deadline for doing that.

Now, I still want to try to convince you to give us a stay, so I don't want to give up this issue. But if you were to deny a stay, it's hard for me to see how you're going to [32] grant us interlocutory appeal.

THE COURT: That's why when we had the original discussion, I think that's probably going to be moot anyway.

MR. COFFIN: I don't think it will be moot. I think you could still grant it, and I would ask that you give us full consideration of such a motion. I think practically—I'm not sure—I think the writing is on the wall if you

were to deny a stay, however, depending upon what your standard was in denying the stay. As a practical matter, we believe that we have to file any appeal in the Court of Appeals by November 8.

THE COURT: All right. I'm not going to comment on that because that's beyond—

MR. COFFIN: Your Honor, I understand. I'm not —

THE COURT: You may be absolutely right. Actually, when I saw the motion for interlocutory, I thought the government was conceding there was no basis for appeal after—

MR. COFFIN: No, Your Honor. We say in the beginning of that brief we were asking you for 1292(b) certification to avoid applying the *Nixon* rule in the Court of Appeals and to avoid the need for a mandamus determination, so we clearly think any three of the methods is appropriate.

But as a result, and I'm not asking for your blessing on this, but as a result we believe we may have to seek an appeal by the 8th. And I still have to confer with the Solicitor General's Office on everything else on timing, but that would [33] mean that if you hadn't granted interlocutory appeal by then we'd be going up on other theories.

THE COURT: All right.

MR. COFFIN: So the fact that he's asking for a brief on the 7th we have no objection to, but it may force our hand to seek an appeal—well, just the timing generally. I don't think there's much time anyway, but the bottom line is we're going to have to go up I think by the 8th.

THE COURT: And again, you may be absolutely correct. I haven't given any thought to that aspect of it.

MR. BOOKBINDER: Your Honor, one other thing, and I'm not sure Mr. Coffin and I conferred on this, but it might be useful on the 13th when we're already here on the motion to compel to do the 1292(b) motion as well that day if Mr. Coffin wants to do so.

MR. COFFIN: Again, if we're already in the Court of Appeals, I think it might be mooted then. If we already filed another appeal on another theory—

THE COURT: If you have an appeal and another stay, then everything is moot, at least the motion for interlocutory—

MR. COFFIN: If we have a stay, if we have an extension.

THE COURT: I can schedule it. I agree. I have not scheduled a date. I thought that the parties had originally [34] agreed to an accelerated briefing schedule to the interlocutory, and then the government informed the Court in one of its pleadings that that was not correct.

MR. COFFIN: Well, we had—

THE COURT: You sought expedited briefings.

MR. COFFIN: We sought it, and the plaintiffs did not agree.

THE COURT: Look, I'm willing to help the parties. I've already indicated I'm not inclined to stay; I'm not inclined to certify it. By the same token, I'm not trying to make it difficult for anyone to seek review. I mean, I can schedule a hearing before the 7th if you want me to.

MR. COFFIN: Can I suggest this, that the 13th would be okay. It may be that we have decided to withdraw our interlocutory appeal by then. I think

that—and if so, we'll notify the parties. If we go up on another theory, I don't want to foreclose—

THE COURT: No, and I'm not trying to be difficult at all.

MR. COFFIN: I'm not sure I can speak for the Solicitor General of the United States on this particular issue.

THE COURT: And I'm certainly not requiring you to do so.

MR. COFFIN: Why don't we go with the 7th for your [35] brief?

THE COURT: Do you want a few minutes to talk?

MR. COFFIN: No, I think we're fine. We're in general agreement that if he could file by the 7th and we would file any response by the 12th and have a hearing on the 13th.

THE COURT: It doesn't give me a lot of time to think about that. There's a holiday on the 11th. Can you get your response in sooner than the 7th, Counsel?

MR. BOOKBINDER: I can do Wednesday the 6th.

THE COURT: That's the earliest?

MR. COFFIN: And we can file by the 8th, Your Honor.

THE COURT: That's great. It's all electronic anyway. That will be great. The 8th's a Friday, and then the hearing on the 13th will be for the pending motion as well as for the government's motion for interlocutory certification.

MR. BOOKBINDER: Thank you, Your Honor.

THE COURT: Sure.

MR. COFFIN: Your Honor, can I go back to the stay versus—

THE COURT: Yeah, sure. Go ahead.

MR. COFFIN: I want to make clear that—I mean, I understand your analysis here, Your Honor, but I think—

THE COURT: Well, tell me if it's wrong.

MR. COFFIN: I think it's incorrect. I think it's inappropriate to take into consideration the possibility of a [36] stay in the Court of Appeals in determining whether irreparable injury is met.

THE COURT: No, no. I'm sorry. If you understood me to say that I'm denying it but the Court of Appeals will grant it, I have no view as to whether the Court of Appeals will grant it. I'm just saying you have the opportunity to ask the circuit for a stay. That's why you're not foreclosed

MR. COFFIN: But that opportunity shouldn't be taken into account by this court in determining whether irreparable injury—we're asking for a stay pending appeal.

THE COURT: I was concerned because you said, Judge, if you don't grant our stay, we're foreclosed from taking an appeal. That's what you said.

MR. COFFIN: No, no, no, Your Honor.

THE COURT: Then I misunderstood you then.

MR. COFFIN: I think so. We are not foreclosed from doing so, but the relief would be mooted in the absence of a stay because our argument is that compliance with this last order of the Court imposes an unconstitutional burden on the United States. I recognize this court has

said that it disagrees with that, but it's also said it's a serious issue.

And if we are correct on the merits of that, in the absence of a stay, an appeal is meaningless because the Court will say you've already done exactly what it is that you say is unconstitutional, so it's mooted. So a stay is necessarily to [37] fully effectuate our appellate's rights here.

THE COURT: And this goes back to your argument that the injury is indeed the search.

MR. COFFIN: In part. In part, certainly.

THE COURT: Well, I'm certainly not requiring you to turn over any privileged documents at all.

MR. COFFIN: No. I know you're not doing that, but the injury is submitting to discovery in the absence of a compelling showing of need by the plaintiffs. And if our argument is correct, and we believe it is, and we believe the Court of Appeals will agree with us that it's correct, if that's correct, then we can only get relief by getting a stay of your order during the entire pendency of the Court of Appeals determination.

THE COURT: I want to make the record clear. If I deny a request for a stay, it's not because this court has any view of how the circuit court is going to address that issue at all. If I deny the request, it would be because the Court is of the opinion that there's no factual and legal predicate for a stay. That would be the only reason.

I'm going to make a decision upon the issues before me and not what some other court may do. No. I thought you said earlier on: Judge, we've lost. We're

foreclosed from appealing if you deny the request for a stay. I understand what you're saying.

[38]

MR. COFFIN: But that's true. It's mooted. We'd lose an effective right to an appeal.

THE COURT: You're saying the injury continues because we would nevertheless be searching our records, which we believe is unconstitutional.

MR. COFFIN: No, no, no, Your Honor.

THE COURT: Well, then I don't understand what's the injury then.

MR. COFFIN: When the 22nd comes and that's the date you've ordered us to comply, and we comply, then our appeal is meaningless.

THE COURT: Well, see, that's something new now.

MR. COFFIN: No, no, no.

THE COURT: Yes, it is, because granting your request for additional time is to give you time within which to seek relief so you don't have to comply. I thought you told me—

MR. COFFIN: No, no, Your Honor. These are alternative things. I mean, we are asking right now—our principal request for relief here is a stay pending the duration of the appeal. That means that whatever date you set, whether it's November 5 as it currently is, which I know you're not going to do, or November 22—which is the date we've agreed upon with the Sierra Club, at least—if we get to the 22nd and we go through the process and we produce the documents that are—

[39]

THE COURT: Is that an option that the government's seriously considering doing, producing the documents?

MR. COFFIN: Your Honor, in the absence of a stay, again, our only other option is to go into contempt.

THE COURT: Or to seek a stay from the circuit.

MR. COFFIN: In the absence of a stay. You're making a distinction again between a stay by the circuit and a stay by this court, and I don't think that in your evaluation of the merits of our stay petition you can consider whether we get a stay by the Court, because that assumes that we're entitled to a stay.

THE COURT: I guess I was trying to pin you down as to what your injury is. What you're concerned about is what happens on the 22nd if you don't have a stay from this court or the circuit.

MR. COFFIN: Absolutely.

THE COURT: Well, that's something new.

MR. COFFIN: No, no, no. That's not anything new at all. That's what I've been saying all along.

THE COURT: Well, you know what, I think we should focus on that if that materializes. In other words, if I deny a stay and the circuit denies a stay and you're faced with the 22nd for a deadline, then I think —I mean, it would be very unwise for me to sit here and say what I'm going to do at that point.

[40]

MR. COFFIN: Your Honor, if you deny a stay and the Court of Appeals denies a stay, then there's been some —and the Supreme Court, if we were to ever decide to go that far, a circuit justice, which is a possibility again

—then compliance with the order is either mandatory or we have to go into—

THE COURT: Don't we have to cross that bridge when we get to?

MR. COFFIN: No, I think you have to cross it now. I think that you have to make a determination whether compliance with your order, whether it would moot the appeal, and that is the determination

THE COURT: All right. Well, that's where we disagree. That's where we disagree, because I've given this a is lot of thought, and I said, I'm going to extend the time. Sierra Club doesn't object, Judicial Watch does, the government is attempting to comply, searching its records. I believe your pleading says there are eight lawyers at the White House searching boxes of records in an effort to determine privileged versus nonprivileged and preparing a log.

I said that's good faith compliance; I'll give the government more time. And so that no one has any anxiety about this, I'll make the 22nd or 23rd, some day in November other than Thanksgiving, I'll make it that week. And I'm still, inclined, gave a lot of thought as to whether or not to grant [41] the request for stay, and I said no. I'm not persuaded there's a factual legal predicate.

That's the only reason why I would deny the request for a stay, if I'm not persuaded it's a matter of fact and law that a basis exists. Denied that. I thought about it. Now, where does that leave the government? It leaves the government—the government can always seek a stay. In fact, you have to seek a stay first—

MR. COFFIN: But that's—

THE COURT: Wait, wait, wait. You have to seek a stay first before me before you can seek a stay in the circuit, right? You have to do that.

MR. COFFIN: And we're required to do that.

THE COURT: And if I deny it, then the safeguard, is the way our system works is that you can seek another stay in the circuit. Now you're concerned about a scenario where the circuit may deny a stay and you're faced with what to do on the 22nd, but that's not before me.

MR. COFFIN: No, no. It is definitely before you, Your Honor.

THE COURT: So I should be focusing on that now?

MR. COFFIN: Absolutely. The order right now that's in front of you—

THE COURT: You know what, let me tell you something. You know I'm not going to close the door on you or any other [42] litigant before me, and if indeed I deny the stay and the circuit denies the stay, you know this courthouse is open to whatever request you want to make prior to the 22nd. And I'll be receptive to whatever request you want to make, but we're looking down the road to something—I mean, I think it would probably be inappropriate for me to say what I would do in the event that there's no stay of my order and whether or not the government then is under an obligation to comply with my order.

MR. COFFIN: Your Honor, right now your order requires us to produce by November 5.

THE COURT: All right. Forget about that. I'm going to extend it to the 22nd or the 23rd.

MR. COFFIN: The point is it doesn't matter whether it's November 5 or—

THE COURT: Oh, I think it does. It would matter if the due date was tomorrow, wouldn't it?

MR. COFFIN: Well, it would just mean—

THE COURT: Well, you know what—

MR. COFFIN: —an emergency reason to provide a stay.

THE COURT: Well, that's exactly right. But that heightened—no, no. Wait a minute; I gotcha now. Because if I deny the request for the stay and the due date was tomorrow and the circuit denied the request for a stay, then you're a absolutely correct. You need some guidance from me as to what [43] I need to do because you need to take some steps to protect your client. But that's not a problem. You don't have to concern yourself about that.

The Court is always open. The Court is always going to be receptive to your request for additional relief in the event that I deny the stay, which I'm going to do, and in the even if the circuit denies the stay and you believe your client is powerless, I'm not going to close the door on your request for relief.

MR. COFFIN: No, and I fully understand and appreciate that, Your Honor, but I don't think this court appreciates what the issue is here. The issue here is whether a stay pending appeal is necessary to fully effectuate our appellate rights. As soon as this stay issue is resolved, we're going to be taking up the appeal in one way another, whether through 1292(b) or 1291 or mandamus. So your chance to rule on whether there is a stay pending appeal is now, and that requires you to

decide whether a stay is necessary to fully effectuate our appellate rights.

In an absence of a stay, compliance with your order is mandatory or we face contempt. That is why that issue is joined in front of you now, and that's why a stay has to be granted. You don't argue that—you haven't disagreed with us, and I don't think the plaintiffs really have, that these are serious issues. You've said that yourself. So the only [44] issue is whether there is irreparable injury, and there is certainty irreparable injury if an appeal goes forward and we lose our effective appellate rights in the absence of a stay.

That's the argument, and that issue is in front of you right now, whether it's November 5, whether it's November 1, or whether it's November 22. And you have to decide that now, and you can't say that because we can go to the Court of Appeals that we have a remedy. Because in reality, they're going to be asking the same questions, and if you are saying we have a remedy—

THE COURT: They'll be asking the same questions I'm asking?

MR. COFFIN: Absolutely.

THE COURT: Sure. I would imagine so.

MR. COFFIN: But if you were saying we have an effective remedy in the Court of Appeals, it's because the Court of Appeals would agree with us. So I don't understand—

THE COURT: No, I'm just saying you have an opportunity to seek relief in the Court of Appeals. I didn't say it was a foregone conclusion. Again, I don't know what the circuit court's going to do. I can appre-

ciate that the Court may have the same questions, but you're not being deprived of a potential remedy. You have the right to request a stay. That's the point I was making.

MR. COFFIN: But Your Honor, our argument isn't that [45] we have an opportunity to seek a stay in the—we're not being deprived of that. I've never argued that. We certainly have an opportunity to seek a stay in the Court of Appeals. The question is whether we'd be deprived of our underlying appeal. This is just like Judge Kessler recently in the CNSS detainee FOIA case. Once those documents are released and I know — no, no. I understand what you're going to say.

THE COURT: That's the distinction.

MR. COFFIN: There's no distinction legally because our argument is that—Your Honor, our argument is that once we comply with this order, we can't get effective relief from your order.

THE COURT: And I totally agree with you. If you completed your search, keeping in mind what you just said about Judge Kessler's case, if you completed your search, isolated the documents, prepared the privilege log and gave everything over, it's probably moot.

MR. COFFIN: Your Honor, the legal—

THE COURT: You've complied with it—

MR. COFFIN: Your Honor—

THE COURT: —but I wouldn't do that.

MR. COFFIN: Your Honor, you're missing the major point that's made in these cases. In this case there certainly would be harm from releasing the documents, but I'm not talking about that. I'm talking about com-

pliance with your order. We [46] have argued that compliance with your order imposes an unconstitutional burden.

THE COURT: Right. The serious preparation of the log.

MR. COFFIN: Yes, and once we comply with that order, we have assumed that unconstitutional burden. So it's the same exact argument that Judge Kessler accepted.

THE COURT: You're complying with the order now, so maybe the controversy is moot.

MR. COFFIN: No, Your Honor.

THE COURT: You're argument is that compliance with my order to undertake a search and preparation of a log has some impact on this—

MR. COFFIN: Yes, there is certainly some impact. No, it's not moot. We are realizing that harm right now out of deference to this court. Yes, that is absolutely correct. We are realizing a harm right now.

THE COURT: But you're complying with it.

MR. COFFIN: If you accept our argument—

THE COURT: Why is it different then from a litigant turning over privileged documents and complying with the harm? Doesn't that moot the controversy?

MR. COFFIN: It's no different. It's the exact same point. If you turn over privileged documents, you've mooted an argument about privilege; if you turn over documents where you say [47] you don't have to comply with an order, you've mooted a dispute about the order. That's exactly our argument.

THE COURT: And you're complying with the order now by undertaking a search that you believe is unconstitutional, so why isn't this controversy moot?

MR. COFFIN: It is not moot because we still have an obligation to comply with your order and we haven't fully complied. So yes, we are being harmed right now by your order under our position. There is no question that turning the Office of the Vice President upside down imposes a burden on us, and we are realizing that burden out of deference to this court's order. Having said that, we haven't—

THE COURT: Well, it's certainly not my intent to turn anyone's office upside down when I issue my orders. Thank you, Mr. Coffin. Anything further? I just want to take a short recess. Mr. Klayman?

MR. KLAYMAN: Just a last point, Your Honor. This is why Your Honor has to just make a ruling and live by it. We went through this during the Watergate and the Nixon period. Nixon didn't want to turn anything over to Judge Sirica. He put his foot down and said I've had enough, that's it, turn it over.

THE COURT: All right. I'm going to take a 10-minute recess.

(Recess)

[48]

THE COURT: All right, Counsel. I'm going to think about the issue. I'll continue the hearing until 10 o'clock tomorrow morning, and I'll rule on the government's request for a stay at that time. Thank you, Mr. Coffin, for the points that you've made, and I'll give it some further thought. I'm still inclined to deny it, but I want

to consider the request in light of your representations this afternoon.

MR. COFFIN: Thank you.

THE COURT: All right. The parties are excused. Thank you. I'm sorry, to the attorneys on the phone, did you wish to say anything?

MR. NARAYAN: No, Your Honor.

THE COURT: All right. You're welcome to participate tomorrow if you wish. I recognize that's early on the West Coast, but that's the only time I can squeeze this matter in. It'll be 10 o'clock Eastern Time tomorrow. Thank you.

(Proceedings adjourned at 2:25 p.m.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,
DEFENDANTS

Civil Action No.: 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.,
DEFENDANTS

Nov. 1, 2002

ORDER

Pending before the Court is non-agency defendants' motion for a stay of proceedings pending appeal of this Court's October 17, 2002, September 9, 2002, and July 11, 2002 Orders authorizing limited discovery from defendants on threshold issues, and ordering defendants to produce non-privileged documents responsive to plaintiffs' discovery requests, along with a privilege log identifying those documents for which defendants believe there is a valid basis for the assertion of a privilege. Upon careful consideration of defendants'

motion, the response and reply thereto, and the relevant legal authority, and for the following reasons, it is by the Court hereby

ORDERED that defendants' motion for a stay is **DENIED.**

I. BACKGROUND

Non-agency defendants move for a stay of, inter alia, this Court's October 17, 2002 order, which requires them, consistent with this Court's August 2, 2002 Order and July 11, 2002 Memorandum Opinion and Order, to respond to plaintiffs' First Set of Interrogatories and to produce by no later than November 5, 2002, non-privileged documents responsive to plaintiffs' First Request for Document Production, along with a log identifying specific documents or particularized categories of documents for which they assert that a privilege precludes production, and. Defendants seek a stay to pursue an appeal to the Court of Appeals for the D.C. Circuit, on the grounds that this Court's Orders implicate important constitutional and statutory questions that are best resolved by the Court of Appeals before litigation proceeds any further in this case.

II. LEGAL STANDARD

The following factors are to be considered when determining whether a stay pending appeal is warranted:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.

Cuomo v. *United States Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 842, 843 (D.C. Cir. 1977). It is "the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978. This Circuit has recently reiterated that a moving party must satisfy "stringent standards required for a stay pending appeal." *Summers* v. *Howard University*, 2002 WL 31269623 (D.C. Cir., Oct. 10, 2002). Where a moving party fails to establish a substantial case on the merits, and further fails to "demonstrate that the balance of equities or the public interest strongly favors the granting of a stay," a motion for stay is properly denied. *Cuomo*, 772 F.2d at 972.

A. Likelihood of Success on the Merits

Recognizing that this Court has, on numerous occasions, rejected their arguments to this effect, defendants nevertheless continue to assert that court orders requiring them to respond in any fashion to plaintiffs' discovery requests creates an "unconstitutional burden" on the Executive Branch unless plaintiffs are first required to demonstrate "compelling need" for the discovery sought. Defendants have cited no authority, and indeed this Court knows of none, which supports this proposition. To the contrary, every case cited by the defendants in support of their position involved precisely the same procedure adopted by this Court in this case. Moreover, the U.S. Supreme Court has

recently confirmed the continued validity of the precedent of long-standing relied upon by this Court in the Orders and Opinions contested by defendants. As recently as 1997, the nation's highest court held

> In sum, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." . . . the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct. . . . [emphasis added]

Clinton v. *Jones*, 520 U.S. 681, 705, 117 S. Ct. 1636, 1650 (1997). Here, as in Jones, this Court is of the opinion that defendants "err[ ] by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionality forbidden impairment of the Executive's ability to perform its constitutionality mandated functions." See *Clinton* v. *Jones*, 520 U.S. at 702, 117 S. Ct. at 1648.

Notwithstanding this U.S. Supreme Court precedent, and the absolute dearth of authority supporting their arguments, defendants nevertheless contend that requiring them to review documents responsive to plaintiffs' discovery requests, disclose those for which no viable claim of privilege exists, and assert any applicable privileges with respect to specific documents, impermissibly interferes with "core Article II" functions and imposes an unconstitutional burden on the Executive Branch. The Court rejects these arguments and is not persuaded by defendants' assertion that they have demonstrated a likelihood of success on the merits of their appeal of this Court's Orders.

B. Irreparable Harm

Under this Circuit's precedent, the harms to each party are tested for "substantiality, likelihood of occurrence, and adequacy of proof." *Cuomo* 772 F.2d at 976, 977. The Court must consider the significance of the change from the status quo which would arise in the absence of a stay, as well as likelihood of occurrence of the claimed injury, when determining whether defendants have truly met their burden of demonstrating irreparable harm justifying imposition of a stay. See *id.*

The fact of the matter is that the offices of the President and Vice President currently respond to discovery requests on a regular basis, asserting executive privilege with respect to specific requests for particular items when necessary. See, e.g. *Clinton* v. *Jones*, 520 U.S. at 704, 117 S. Ct. at 1649.

Plaintiffs correctly point out that, in the cases cited by the defendants, stays of court orders authorizing discovery against officers of the Executive Branch have been granted only in cases where a court ordered production of a particular document after a viable claim of privilege had been made. See e.g., *Nixon* v. *Sirica*, 487 F.2d at 721 (approving stay of District Court orders either allowing or refusing disclosure of specific documents for which President has made a particularlized claim of privilege).

Moreover, it is in fact defendants who seek to change the status quo by asking this Court to relieve them of their responsibility to respond to plaintiffs' discovery requests and assert executive privilege where appropriate. Defendants' argument that any "discovery directed at" them imposes an unconstitutional burden on them absent a showing by plaintiffs of "compelling

need" represents a dramatic new argument with respect to invocation of executive privilege, and contemplates the wholesale elimination of an entire step in the established discovery processes in this context. Furthermore, defendants themselves concede that, at least in some respects, they are seeking to expand the executive privilege, not simply rely on its settled contours. See Def.'s Mot. for Stay at 8 (claiming that requiring disclosure of documents which "may not be technically privileged" would nonetheless impose unconstitutional burdens on the Executive Branch).

There is no doubt that, if defendants' premise is accepted that compliance with this Court's discovery order imposes an unconstitutional burden, defendants would suffer irreparable harm if the proceedings before this Court were not stayed to enable them to seek appellate review of such an order. However, this Court has consistently rejected, and continues to reject, in reliance upon established precedent of long-standing, defendants' central argument, namely that requiring the Vice President and members of the Executive Branch to merely review documents requested by the plaintiffs and assert executive privilege where appropriate, is unconstitutional. Defendants cannot be permitted to manufacture irreparable harm by simply stating a legal principle with no precedential support whatsoever, and then claiming irreparable harm if they believe a court order violates that principle.

Accordingly, there is insufficient likelihood of "irreparable harm" to the defendants to justify a stay. Both the Circuit and the U.S. Supreme Court have approved the very "harm" defendants point to: discovery procedures in which a request for documents from a member of the Executive is made in the context

of judicially supervised discovery, the document is either produced or a privilege is asserted with respect to the document, and, in the latter case, the party seeking the document must demonstrate that the public need for the document outweighs the interests underlying the privilege in order to obtain production of the document. See, e.g., *Clinton* v. *Jones*, 520 U.S. at 704-05; *In re Executive Office of the President*, 215 F.3d 20, 22, 24; *Dellums* v. *Powell*, 561 F.2d 242, 247, 248 (D.C. Cir. 1977); see also *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 439-455 (1977).

C. Public Interest

Conversely, the harm to both the plaintiffs and the public of granting the stay is substantial, likely, and adequately proven. As plaintiffs point out, Congress, Executive agencies, and the public have been debating the energy policy developed by defendants without the benefit of the information sought by plaintiffs in this case. In some instances, final actions have already been taken. As time proceeds, the value of the information sought by plaintiffs and the public declines substantially, thereby effectively denying plaintiffs the relief to which they contend they are entitled. Additionally, both Congress and the Judicial Branch have recognized the public interest in avoiding "piecemeal "litigation occasioned by stays and interlocutory appeals. See, e.g., *United States* v. *Nixon*, 418 U.S. 683, 690 (1974).

Therefore, upon balancing of relevant factors, this Court concludes that there exists no factual or legal predicate for granting defendants a stay pending appeal. Accordingly, defendants' motion for stay pending appeal is hereby **DENIED**; and it is

FURTHER ORDERED that defendants' alternative motion for an extension of time in which to respond to plaintiffs' first request for document production is **GRANTED**; and it is

FURTHER ORDERED that defendants shall fully comply with this Court's outstanding Orders by no later than **November 29, 2002.**

Additionally, pursuant to the hearing held on defendant's motion for stay on October 31, 2002, and for the reasons given in open court, it is by the Court hereby

FURTHER ORDERED that plaintiffs shall file their response to defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) by no later than **November 6, 2002** and defendants shall file their reply by no later than **November 8, 2002**; and it is

FURTHER ORDERED that defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) shall be considered at the currently scheduled **November 13, 2002** hearing on all pending motions; and it is

FURTHER ORDERED that plaintiffs shall file a reply in support of their motions to compel by no later than **November 7, 2002.**

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
November 1, 2002

Notice to:

Larry Klayman, Esq.
Paul J. Orfanedes, Esq.
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, DC 20024
Counsel for plaintiff Judicial Watch

Roger M. Adelman, Esq.
1100 Connecticut Avenue, N.W.
Suite 730
Washington, DC 20036
Counsel for plaintiff Sierra Club

David G. Bookbinder, Esq.
408 C Street, NE
Washington, DC 20002
Counsel for plaintiff Sierra Club

Patrick Gallagher, Esq.
Alex Levinson, Esq.
Sierra Club
85 Second Street
San Francisco, CA 94104
Counsel for plaintiff Sierra Club

Daniel Edward Bensing, Esq.
David O. Buchholz, Esq.
Anne L. Weismann, Esq.
Thomas Millet, Esq.
Jennifer Paisner, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Counsel for federal defendants

Howard M. Crystal, Esq.
MEYER & GLITZENSTEIN
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
Counsel for amicus NRDC

Robert S. Litt, Esq.
ARNOLD & PORTER
555 12th St NW
Washington, DC 20004-1206
Counsel for defendant Thomas Kuhn

Paul Christian Rauser, Esq.
WILLIAMS & CONNOLLY
725 12th Street, NW
Washington, DC 20005
Counsel for defendant Haley Barbour

Richard D. Horn, Esq.
BRACEWELL & PATTERSON LLP
2000 K St NW
Suite 500
Washington, DC 20006-1872
Counsel for defendant Mark Racicot

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that Vice President Richard Cheney, a Defendant in the above-named consolidated cases, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from (i) the order entered in this action on the 1st day of November 2002; (ii) the order entered in this action on the 17th day of October 2002; and (iii) the order entered in this action

on the 9th day of September, 2002.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE E. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

THOMAS MILLET
D.C. Bar #294405
CRAIG BLACKWELL
JENNIFER PAISNER
Attorneys, Civil Division
Department of Justice
901 E St., N.W.
Room 812
Washington, DC 20530
Tel: (202) 616-8268
Fax: (202) 616-8460

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-
[Civil Action Nos. 01-1530, 02-631 (EGS)

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, *ET AL.*,

EMERGENCY PETITION FOR
WRIT OF MANDAMUS

INTRODUCTION AND SUMMARY

The Vice President of the United States and the other defendants in these consolidated cases respectfully petition this Court for a writ of mandamus to direct the district court to decide this case on the basis of the administrative record, a course dictated by fundamental principles of review under the Administrative Procedure Act and by the substantial constitutional questions presented by the discovery ordered in this case. We also ask that the Court direct that the Vice President, who is not an "agency" within the meaning of the APA, be dismissed as a party.

The Vice President, who can appeal the court's rulings as of right under *United States* v. *Nixon*, 418 U.S. 683 (1974), has filed a notice of appeal, and, in the interests of expedition, stands ready to file an opening brief on whatever schedule the Court deems appropriate.

1. Plaintiffs in these actions allege that the National Energy Policy Development Group ("NEPDG") —an Executive Branch task force established by Presi-

dent Bush, composed of the Heads of Departments and close Presidential advisors, and chaired by the Vice President—operated in violation of procedures established by the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix 2. Plaintiffs' suits are, on their face, devoid of merit: the FACA has no application to committees that are "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." *Id.* § 3(2). The President's directive established the NEPDG as an entity composed exclusively of federal officers and employees. App. 117-18. The NEPDG's final report confirms that it operated as such. *See Reliable, Affordable, and Environmentally Sound Energy For America's Future: Report of the National Energy Policy Development Group* ("Report") (available at www.whitehouse.gov/energy). As the government also urged in its motion to dismiss, application of the FACA to a group of close Presidential advisors chaired by the Vice President would be unconstitutional. *See Association of American Physicians and Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993) ("*AAPS*").

The district court nevertheless denied the government's motion to dismiss, reasoning that it was sufficient for plaintiffs merely to *allege* that the President's formal and express specification of the group's membership, and the group's confirmation of its composition in its final report, did not accurately portray the membership of the group. The court then denied the government permission to file a motion for summary judgment, refusing to decide the case on the basis of the President's own directive, the group's final report, and a supplementary affidavit filed by the government that confirmed that the NEPDG consisted only of top-level

government officials and that its meetings were attended only by government personnel. The court also refused to dismiss the Vice President as a party, concluding that mandamus review of his actions on behalf of the President in chairing the NEPDG might be available.

Instead, the court approved a far-ranging discovery plan that seeks production of documents and information beyond what would be obtained under the FACA itself if plaintiffs ultimately succeeded on their claim. The documents covered by the discovery order include communications between individual NEPDG members outside the context of group meetings, between NEPDG members and agency personnel, and between NEPDG members and outside individuals. *See, e.g.*, App. 246, Request for Production No. 3; App. 251, 253, Plaintiffs' First Set of Interrogatories, ¶ B and Interrogatories Nos. 3, 4.

The government then attempted to limit discovery against those defendants with the greatest operational proximity to the President, especially absent a showing of need. The court rejected those efforts and ordered the Vice President and other close presidential advisors to comply with plaintiffs' discovery requests.

2. The court's orders find no basis in the FACA, contravene fundamental principles of judicial review of actions of the Executive Branch, as well as interbranch comity, and engender (and, indeed, magnify) the very constitutional problem that the district court believed it could avoid by declining to resolve the constitutional questions raised by this suit and instead focusing on the statutory question of whether the FACA applied to the NEPDG.

Because, as the district court recognized, the FACA confers no private right of action, a suit alleging that federal officials failed to comply with the FACA must proceed under the APA, as a suit for judicial review of agency action. The APA does not apply here, however, because neither the President nor the Vice President (who acted on behalf of the President in chairing the NEPDG) is an "agency" for purposes of the APA. The district court suggested (but has not yet decided) that an action might lie against the Vice President under the general terms of the mandamus statute, 28 U.S.C. 1361, notwithstanding Congress's decision to omit any statutory cause of action in this setting. Such a suit would itself raise serious constitutional problems in a case involving a group in such close proximity to the President. Under either approach, however, review is limited to the administrative record: courts are not authorized to permit discovery into the inner workings of the Executive Branch except in extraordinary instances. The President and Executive Branch agencies routinely create intragovernmental working groups and task forces to address a broad range of issues. The FACA, by its terms, expressly exempts such intragovernmental groups from its reach. Neither the FACA nor the APA contemplates discovery into the workings of these groups based on bare assertions that the groups are subject to the FACA.

The district court's premise in permitting discovery was that plaintiffs were entitled, as a matter of law, to investigate whether the membership of the committee was materially different than the membership prescribed by the President and reported by the committee itself. This stands customary presumptions of administrative regularity on their head, and does so in a

context fraught with separation-of-powers difficulties. The proceedings of Executive agencies are accorded a presumption of regularity, and allegations of bad faith warrant discovery only upon a strong preliminary showing that misconduct has occurred. That showing plainly has not been made here. Even in a run-of-the-mill APA action, discovery into the conduct of agency decisionmakers would not be permitted based on a generalized assertion that "the government doesn't always comply with the law." App. 217, Tr. of Aug. 2, 2002 Hearing.

Such principles should apply, *a fortiori*, when the consequences of ordering discovery is to allow substantial intrusions on the process by which those in closest operational proximity to the President advise the President. The discovery of the Vice President compelled by the district court would result in even more sweeping intrusions into the Vice President's office than would result from the remedies available if plaintiffs were to prevail on the merits of their suit. Accordingly, by allowing such discovery on the mere allegation of "unofficial" members, the District Court eliminated the FACA's exemption of intragovernmental groups as a practical matter. That ruling creates, rather than avoids, constitutional difficulties.

Contrary to the district court's understanding, the Vice President should not be forced to review the process by which he advised the President and claim executive privilege to protect privileged papers in response to an unsupported allegation that the membership of the President's advisory committee was materially different than that proscribed by the President. In particular, the Vice President of the United States respectfully but resolutely maintains, in

the circumstances of this case, that extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President raises separation of powers problems of the first order. Discovery against the Vice President should not proceed, especially absent a compelling countervailing interest and a special showing of need. No such countervailing interest or showing has been made here and, in light of the ample record of agency materials already provided to plaintiffs, it is plain that no such demonstration could be made.

3. The district court's error is compounded by its refusal to dismiss the Vice President as a party. The Vice President is not an "agency" within the meaning of the APA, and the scope of non- statutory review recognized by this Court does not extend either to actions directly against the Vice President or to the type of error alleged in this case. Moreover, as the Supreme Court has made clear in recent decisions, *see, e.g.*, *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2276 (2002), implied judicial review is inappropriate when a particularized provision allows only limited review (or no review). Here, the APA limits review to the agency record and does not reach the Vice President. No evidence exists that Congress, in declining to provide a cause of action under the FACA itself and declining to extend the APA to the President or the Vice President, intended to permit *greater* intrusion into the top levels of the Executive Branch than is available even against a regular agency in an ordinary suit under the APA.

In sum, the district court's refusal even to consider a motion for summary judgment and its approval of

intrusive discovery constitutes clear and significant error warranting the exercise of this Court's supervisory authority and requiring reversal in the Vice President's appeal.

STATEMENT

A. *Facts.*

President Bush established the NEPDG as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. *See* App. 117. The President named the Vice President to preside over meetings and direct the work of the NEPDG and designated a number of other senior federal officials to constitute the NEPDG.[1] In addition, the Vice President was authorized to invite the participation of the Chairman of the Federal Energy Regulatory Commission, the Secretary of State and "other officers of the Federal Government." App. 118.

The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Ibid.* The NEPDG was given no operational or administrative responsibilities; rather it was

---

[1] These were: the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Director of the Federal Emergency Management Agency, the Administrator of the Environmental Protection Agency, the Assistant to the President and Deputy Chief of Staff for Policy, the Assistant to the President for Economic Policy, and the Assistant to the President for Intergovernmental Affairs. App. 117-18.

directed to "gather information, deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.* Staff assistance was to come from the Department of Energy and, if necessary, from the National Economic Council. App. 118-19.

On May 16, 2001, the NEPDG issued a public report containing a set of recommendations to enhance energy supplies and encourage conservation. *See Report* (available at www.whitehouse.gov/energy). In accordance with the President's January 2001 memorandum, App. 119, the NEPDG was terminated on September 30, 2002, at the end of the fiscal year.

B. *Proceedings Below.*

Plaintiffs Judicial Watch, Inc. and Sierra Club filed these consolidated actions against Vice President Cheney, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG was an advisory committee within the meaning of the FACA. Plaintiffs requested access to NEPDG documents and a declaration that the defendants violated the FACA. App. 48, 113-15. The government filed motions to dismiss, arguing, *inter alia*, that any application of FACA to a group such as the NEPDG, with such close proximity to the President and the Vice President, would violate the separation of powers.

The district court granted in part and denied in part the government's motions to dismiss. The court held that FACA itself provides no private right of action, but that the statute is enforceable through either the APA or an action for mandamus. The court recognized that the Vice President is not an "agency" within the meaning of the APA, App. 148-49, but left open the

prospect that the Vice President could be sued through mandamus, App. 169.

The court deferred ruling on the government's contention that application of the FACA to the NEPDG would violate the separation of powers, on the ground that discovery into the inner workings of the NEPDG with a view toward deciding whether FACA applied as a statutory matter could obviate the need to resolve that constitutional question, App. 170-94. The court acknowledged "the seriousness of the constitutional challenge raised by defendants to the application of the FACA," App. 171, and it recognized that allowing discovery could present related constitutional questions, App. 193.

The court directed plaintiffs to submit a proposed discovery plan, which it approved on August 2, directing the government to "fully comply with" plaintiffs' discovery requests or "file detailed and precise objections to particular requests." App. 238-39. In their initial set of interrogatories and document requests, plaintiffs have requested, *inter alia*, the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and outside individuals. *See, e.g.*, App. 246, Request for Production No. 3; App. 251, 253, Plaintiffs' First Set of Interrogatories, ¶ B and Interrogatories Nos. 3, 4.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established APA procedure. In addition, the government sub-

mitted an affidavit of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." App. 257. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees. She also represented that all of the members of the staff assembled by the Office of the Vice President to assist the NEPDG were government employees, as were other staff from federal agencies that helped draft the report. The latter staff met on "numerous" occasions. The only person from outside the government was a consultant who attended "brief" portions of two or three meetings of staff-level personnel to assist with technical drafting and graphic design matters related to preparation of the report but did not participate in any substantive way in the deliberations or work of the NEPDG or its staff. *See* App. 261-62, ¶¶ 10, 13.

The court denied the government's motion for a protective order, App. 313, and declined to allow the government to file a motion for summary judgment, App. 264.[2] On November 1, 2002, the court denied the government's motion for a stay pending appellate review and required that the government respond to discovery by November 29, 2002. App. 371-72.

---

[2] Because the defendants have been prohibited from filing dispositive motions, they are also unable to dismiss Andrew Lundquist from the suit, despite the uncontested fact that he is no longer a federal employee (and no successor has been named because the NEPDG no longer exists). *See* App. 258, Knutson Declaration ¶ 3.

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1651 AND 28 U.S.C. § 1291.

A. Mandamus is neither lightly sought nor lightly granted. But when district court orders implicate core separation of powers concerns and compel discovery that implicates the same constitutional difficulties this Court has sought to avoid, mandamus is appropriate. Indeed, both the Supreme Court and this Court "have expressed a willingness to employ the writ in an advisory capacity to answer important questions of first impression and in a supervisory capacity to remedy certain classes of error not traditionally thought remediable by mandamus." *United States* v. *Hubbard*, 650 F.2d 293, 309 n.62 (1980); *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257-60 (1957).

As we show below, the district court's error is plain, the constitutional questions raised are substantial, and the consequences are significant and irremediable. When a district court ignores settled principles of judicial review and orders sweeping intrusions into the Presidency and Vice Presidency, this Court should exercise its supervisory powers.

Whether the Vice President is properly named as a party and whether he is obliged to comply with plaintiffs' demands is subject to an appeal as of right. *See United States* v. *Nixon*, 418 U.S. 683 (1974). For essentially the same reasons that the Court found an appealable final order there, this Court should do so here. Just as with the President, it would be unseemly to compel the Vice President—the only Article II officer other than the President named in the Constitution, *see* U.S. Const., Art. II, § 1; *id.* Amend. XII; *id.*

Amend. XX—to go into contempt in order to obtain appellate review of an order authorizing discovery into his conduct in advising the President on matters of the highest significance.[3] Accordingly, the Vice President has filed a separate notice of appeal. Nonetheless, we have included the objections which will be explored in more detail in the appellate papers in this mandamus petition to provide this Court with the option of reviewing the district court's unprecedented orders without definitively determining that *Nixon*'s holding applies to the Vice President.

II. PLAINTIFFS MAY NOT OBTAIN DISCOVERY INTO THE ACTIVITIES OF A GROUP CONSISTING OF THE VICE PRESIDENT, HEADS OF DEPARTMENTS, AND SENIOR PRESIDENTIAL ADVISORS BASED ON A BARE ALLEGATION THAT SUCH A GROUP ACTUALLY INCLUDES NON-GOVERNMENT MEMBERS.

A. Review Of Executive Action Under The APA And The FACA Is Limited To The Record Compiled By The Responsible Executive Official And, Where Appropriate, Supplemental Declarations.

The FACA contains no provision for judicial review, and its provisions are enforceable pursuant to the Administrative Procedure Act and its limitations. *See Claybrook* v. *Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997).

---

[3] The government moved the district court to certify a number of its orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The court has deferred action on that motion until November 13, 2002.

Absent extraordinary circumstances, review under the APA is limited to the administrative record. *See, e.g., Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). A plaintiff cannot circumvent the limitations on APA review by stating a parallel claim for mandamus. Indeed, the principle of confining review to the administrative record predates the APA, *see Texas Rural Legal Aid, Inc.* v. *Legal Services Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991), and thus governs claims for mandamus as well.

Nothing in the language or history of the FACA suggests that Congress believed it was routinely authorizing the type of extraordinary discovery into government operations that is foreclosed under the APA. The FACA itself makes clear that Congress was aware that the government commonly makes use of inter-agency and intra-agency task forces consisting of government officers and employees and exempted such groups from its coverage. *See* 5 U.S.C. Appendix 2, § 3(2). Congress plainly did not intend that any plaintiff could obtain discovery into the inner workings of such a group merely by alleging that group members had contacts with outside persons and that such outside persons might have been accorded a role in the group that was the functional equivalent of formally designated members and for that reason should be deemed members of the group within the meaning of FACA. To the contrary, by providing no private right of action under FACA, and thus making FACA judicially enforceable only through the APA, Congress preserved familiar principles of record review.

The record in this case makes clear that the NEPDG was established as a group of high- ranking government

officials and that it consisted only of those officials. The President's memorandum establishing the NEPDG appointed only federal officials as members and made clear that only "officers of the Federal Government" could be invited to participate. App. 117-18. Consistent with that directive, the NEPDG's final report lists only federal officials as members. *See* Report (available at www.whitehouse.gov/energy). *See also* App. 261-62, Knudson Declaration (describing group membership); App. 93, Letter from David Addington, Counsel to the Vice President to plaintiffs' counsel (explaining that all of NEPDG's members were federal employees).

Where public documents make clear that the government has established a group consisting only of government officers and employees, settled presumptions of regularity preclude broad-based discovery premised on unsupported allegations that the government proceeded in bad faith. *A fortiori* that is so with respect to a group designated by the President and consisting of Cabinet officers and close presidential advisers. In such a case, a court should rule on a FACA claim on the basis of an administrative record and such supplemental declarations as it may require. It may not permit discovery that would be barred in any other APA suit. *See Camp* v. *Pitts*, 411 U.S. at 142-43.

The district court's discovery rulings also reflect a fundamental misconception of both the nature of the FACA and the need to proceed with care in those circumstances in which the FACA implicates the discharge of core Article II powers. The FACA was not designed to limit or chill the way in which the President or Vice President communicate with members of the public whenever an Executive Branch group is preparing a report. The FACA was designed to control

the growth and operation of blue ribbon committees and establish openness in their operations, and a balance in their membership. *See* 5 U.S.C. Appendix 2, § 2; *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 445-46 (1989). If the government wishes to formalize a committee to obtain consensus advice from outsiders, it generally must follow FACA procedures. But the statute does not come into play whenever a member of an intra-governmental group has contacts with outside persons, or even if an outside person has contacts or attends a meeting of the group as a whole. Such contacts with government at all levels are common, entirely lawful, important to informed government, a critical aspect of our democratic process, and indeed inherently related to the right of petition protected by the First Amendment. This case concerns the wholly different question whether a *group* of persons was *officially* constituted to include persons from outside the government and to deliberate and offer advice on a *collective* basis. As this Court has explained, "[s]ince form is a factor" of importance in determining whether FACA applies, the government has considerable control over whether a group it establishes is subject to FACA. *AAPS*, 997 F.2d at 914. Thus, "it is a rare case when a court holds that a particular group is a FACA advisory committee over the objections of the Executive Branch." *Ibid.* Contrary to the district court's understanding, discovery into all communications and meetings by the Vice President or other NEPDG members or staff with outside persons would have little or no bearing on the character of the committee itself, even if (despite the record review principles discussed above) it were otherwise permissible. Nor, given the separation of powers concerns implicated by the discovery authorized here, does it make sense to treat a

straightforward effort by the President to obtain advice from his closest advisers as the "rare case" based on nothing more than an unsupported allegation that "unofficial" members participated.

B. The District Court's Order Reverses The Normal Presumption Of Regularity.

The district court nevertheless believed that discovery should be available as a matter of course because "the government doesn't always comply with the law." App. 217, Tr. of Aug. 2, 2002 Hearing. By this, the district court apparently meant that the plaintiffs' claims could not be adjudicated on the basis of the administrative record or supplemental declarations filed by the government because of what the court chose to accept as an ever-present *possibility* of irregularities (unsupported by any specific evidence in this case).

This approach reverses the normal presumption of regularity accorded to government action. *See United States Postal Service* v. *Gregory*, 122 S. Ct. 431, 436 (2001); *American Federation of Government Employees, AFL-CIO* v. *Reagan*, 870 F.2d 723, 727-28 (D.C. Cir. 1989). It is that presumption, not a generalized speculation that "the government doesn't always comply with the law," App. 217, that governs extra-record discovery into even routine agency action. As the Supreme Court and this Court have explained, "*in the absence of clear evidence to the contrary*, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (emphasis added); *Morris* v. *Sullivan*, 897 F.2d 553, 560 (D.C. Cir. 1990) (same). And that presumption, in turn, ordinarily precludes discovery into the inner workings of the Executive Branch. *See United States* v. *Armstrong*, 517 U.S. 456, 463-65, 468-70 (1996). That must especially be so with respect to a group consisting of the Heads of Departments and close presidential advisers who have been directed by the President himself to prepare advice for him on important policy initiatives.

Thus, in an APA action, a plaintiff may not, for example, demand access to the calendar and phone log of an agency decisionmaker merely by alleging that the decisionmaker might have engaged in *ex parte* contacts. As this Court has explained, extra-record discovery against an agency is warranted only where a plaintiff makes "a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971)); *Community for Creative Non-Violence* v. *Lujan*, 908 F.2d 992, 997 (D.C. Cir.1990); *see also National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1145 (2d Cir.) (Friendly, J.) ("strong preliminary showings of bad faith have been required * * * before the taking of testimony has been permitted with regard to internal agency deliberations"), *cert. denied*, 419 U.S. 874 (1974). Thus, even in cases presenting significant allegations of agency misconduct, this Court has remanded the matter to the agency rather than allow discovery. *See Professional Air Traffic Controllers Organizati on (PATCO)* v. *FLRA*, 672 F.2d 109, 113 (D.C. Cir. 1982) (remanding to agency to develop record on whether there were improper *ex parte* contacts with agency official).

In urging extensive discovery, plaintiffs relied on the part of *AAPS* that remanded a FACA case for expe-

dited discovery concerning a working group formed to gather information and develop alternative policy options for the Task Force on National Health Care Reform established by President Clinton. *See* 997 F.2d at 901, 915-16. However, the Court in that case did not consider the source of a cause of action to enforce FACA, which this Court only later indicated is the APA, *Claybrook* v. *Slater*, 111 F.3d 904, 908-909 (D.C. Cir. 1997), and it accordingly did not consider the scope of discovery properly available in an APA action. Nor is the factual posture of that case similar to that of this action. In *AAPS*, the government's own submissions raised genuine questions as to whether the working group at issue was, in fact, composed of government officers and employees, *see* 997 F.2d at 914-15 (noting government's acknowledgment that participants in the working group's meetings included "special government employees" and "consultants"), and whether the group lacked the formality and structure of an advisory committee, *id.* at 914. No comparable questions have been raised here. Moreover, the Court in *AAPS* did not provide for proceedings on remand on any question concerning the President or Vice President or the membership of the task force itself, once the *legal* status of the First Lady's conceded role was resolved. Only subsidiary matters concerning staff-level participation by outsiders in actual deliberations was involved. Finally, although the Court's decision referred to expedited discovery, it would have been open to the government to argue on remand that, at least in the first instance, the factual questions should have been resolved by further government submissions.[4]

[4] The *AAPS* FACA claim was subsequently mooted when, after the working group became defunct, the government made its documents available for inspection. *See AAPS*, 187 F.3d at 659.

C. By Declining To Follow Established Procedures, The District Court Has Brought To The Fore The Substantial Constitutional Questions It Sought To Avoid.

The substantial constitutional questions raised by discovery into the efforts of the Vice President and a group of senior presidential advisors reporting directly to the President to advise the President in the exercise of his core Article II powers underscore the need for a strict application of the need for and limitations on discovery that would obtain even in a garden variety APA action.

The NEPDG was established by the President, chaired by the Vice President with the active participation of Cabinet officers and other high-ranking federal officials, and charged with providing advice and recommendations directly to the President. As the Supreme Court and this Court have recognized, application of the FACA to similar committees raises serious constitutional questions. In *Public Citizen*, the Supreme Court recognized that application of the FACA to an American Bar Association committee that made reports for the Attorney General on prospective judicial nominees "would present formidable constitutional difficulties." *Id.* at 466. *See also id.* at 488-89 (Kennedy, J., concurring) (holding that application of the FACA would be unconstitutional). In *AAPS*, this Court likewise recognized that applying the FACA to a task force that operated in close "operational proximity to the President himself" would raise a "difficult constitutional issue," and construed the FACA to avoid that constitu-

tional question. *Id.* at 909-10. *See also* 924-25 (Buckley, J., concurring) (FACA would be unconstitutional as applied).

Those principles counsel, *a fortiori*, in favor of restraint in this case. While the ABA committee in *Public Citizen* concededly involved individuals outside the government, and the task force in *AAPS* involved the First Lady and an ambiguous group of outside participants, here there is no basis in the record to suspect a committee made up exclusively of high-level presidential advisers, in fact involved any "unofficial," non-governmental members. If the mere allegation of an unofficial, non-governmental member is enough to trigger discovery obligations roughly co-extensive with the available remedies for a FACA violation, then the textual exemption of advisory groups including only government officials, which presumably was designed to protect against undue interference with executive functions, has little practical effect. In that event, the constitutional problems this Court and the Supreme Court have sought to avoid are, in reality, unavoidable. Those problems are avoidable, however, by limiting discovery in accordance with ordinary APA principles of review.

The district court adopted a different theory of constitutional avoidance. It believed that it could avoid deciding whether the FACA could constitutionally be applied to the NEPDG by ruling on statutory grounds. *See* App. 170-94. Had the court done so in accordance with established principles of judicial review of Executive action, that would be an unexceptionable course, and the case would have been dismissed. As the administrative record makes clear, FACA has no application to this all-government committee. Instead, the court

approved intrusions into the operations of the Presidency and Vice Presidency that extend far beyond what would result if the FACA were held applicable. In important respects plaintiffs would obtain greater disclosure through discovery than they would obtain if they prevailed on the merits of their suit. FACA provides for notice of meetings, that such meetings be open, and that records of the advisory committee be publicly available to the extent not exempt from disclosure under FOIA. Plaintiffs' discovery requests seek information about communications between individual NEPDG members outside the context of group meetings, between NEPDG members and agency personnel, and between NEPDG members and outside individuals—none of which would be available under FOIA. *See, e.g.*, App. 246, Request for Production No. 3; App. 251, 253, Plaintiffs' First Set of Interrogatories, ¶ B and Interrogatories Nos. 3, 4.

The district court erred in concluding that these intrusions should be permitted because the President may assert executive privilege to prevent disclosure of certain information. A President should not be forced to "consider the privilege question" in response to unnecessarily broad or otherwise improper discovery. *United States* v. *Poindexter*, 727 F. Supp. 1501, 1504-06 (D.D.C. 1989). Neither *Public Citizen* nor *AAPS*, which recognized the significance of the constitutional issues presented by requiring disclosure, involved information with respect to which the government had asserted executive privilege. Those decisions recognize that the intrusions on the Executive from FACA are not eliminated by the potential to assert executive privilege. That is equally true of the intrusions allowed

by the wide-ranging discovery authorized by the district court.

That constitutionally problematic intrusion could have been avoided if the district court had appreciated the consequences of its determination that this case was an APA action. Alternatively, those consequences could have been avoided by requiring a heightened showing of need for discovery of the President's closest advisers. *See Poindexter*, 727 F. Supp. at 1504-06; *Dellums* v. *Powell*, 561 F.2d 242, 245-249 (D.C. Cir. 1977). As the district court itself recognized, transformation of the FACA into a vehicle by which to obtain extensive discovery regarding the operations of a group chaired by the Vice President and operating in close proximity to the President raises many of the same concerns underlying those decisions, whether or not privilege may be asserted for particular communications. App. 171-72. The Constitution and principles of comity preclude discovery of the President or Vice President, especially without a demonstration of compelling and focused countervailing interest. In this case, the only interest asserted in plaintiffs' lawsuit is a generalized interest in disclosure to the public at large as an end in itself, and wide- ranging and intrusive discovery is sought only in and of that end. Such a generalized interest is wholly insufficient to warrant application of the FACA to a group in such close proximity to the President, much less to warrant the broad discovery plaintiffs seek. Nor have plaintiffs made the sort of threshold evidentiary showing that the NEPDG was not actually constituted as the President directed

that would be necessary in any event to allow review other than that limited to an administrative record.[5]

III. THE VICE PRESIDENT SHOULD BE DISMISSED AS A PARTY.

As plaintiffs conceded, App. 148, the President and Vice President are not "agencies" subject to the APA, *see Franklin* v. *Massachusetts*, 505 U.S. 788, 800-01 (1992), and that statute provides no basis for review of the President's actions in establishing the NEPDG or of the Vice President's actions in chairing the group. The district court believed, however, that the actions of the Vice President might be subject to review by way of mandamus. App. 169. That conclusion is flawed for several reasons.

First, although review of the President's actions for alleged constitutional violations is not foreclosed, the traditional means for obtaining such review is to sue the subordinate officials charged with their implementation. *See, e.g., Dalton* v. *Specter*, 511 U.S. 462, 464 (1994); *Franklin*, 505 U.S. at 790 (suit against Secretary of Commerce); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584 (1952) (same); *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1325 (D.C. Cir. 1996) (suit against Secretary of Labor). As Justice Scalia has explained, official-capacity suits directly against the "principals" of Article I and Article II would raise profound separation of powers concerns. *See Franklin*, 505

---

[5] Indeed, as this Court has made clear, principles of comity require strict limitations on discovery from all high-ranking executive branch officials. *See Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985), *cert. denied*, 510 U.S. 989 (1993); *In re Minister Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).

U.S. at 827-29 (opinion concurring in part and concurring in the judgment); *id.* at 829 ("Unless the other branches are to be entirely subordinated to the Judiciary, we cannot direct the President to take a specified executive act or the Congress to perform particular legislative duties."). For these purposes, the Vice President—one of only two officers of the United States explicitly mentioned in Article II—is not meaningfully distinguishable from the President, especially where the suit concerns actions of the Vice President in assisting the President in the performance of his constitutionally assigned duties, see 3 U.S.C. § 106, including the core Article II functions vested exclusively in the President under the Recommendations and Opinion Clauses of the Constitution. Nothing in the Supreme Court's cases suggests that these principles may be circumvented by naming the President or Vice President on some alternative theory of judicial review.

Second, this Court's cases involving nonstatutory review of Presidential action provide no support for the district court's belief that the Vice President could be named as a defendant or that the claim in this case falls into any recognized category of nonstatutory review. This Court has, in limited circumstances, concluded that review of actions of the President may be available, in suits directed at the appropriate subordinate officials, where the President is alleged to have acted outside his authority. *See Chamber of Commerce*, 74 F.3d 1322 at 1327-28. Plaintiffs' allegations that some NEPDG members may have had discussions with nongovernment employees (which would be irrelevant to the applicability of FACA and entirely improper in any event) cannot plausibly be construed to fall within that narrow category of nonstatutory review. *See, e.g., Leedom* v.

Kyne, 358 U.S. 184, 188-91 (1958); *Griffith* v. *FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988) ("The *Leedom* v. *Kyne* exception is intended to be of extremely limited scope * * *. The Supreme Court and others have sought to confine it to agency error so extreme that one may view it as jurisdictional or nearly so.") (citations omitted); *ibid.* ("review may be had only when the agency's error is patently a misconstruction of the Act * * * or when the agency has disregarded a specific and unambiguous statutory directive") (internal quotation marks and citations omitted); *United States Dep't of Justice* v. *FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993) ("'garden-variety' error of law is not sufficient to bring the Authority's order within the narrow bounds of the *Kyne* exception").

Finally, any suggestion in this Court's cases that nonstatutory review is freely available to enforce a federal statute must be read in light of the Supreme Court's recent decisions addressing judicially implied rights of action and efforts to use broad writs to circumvent particular limits on jurisdiction. As the Supreme Court has explained, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Thus, a plaintiff who seeks to invoke an implied private right of action under a federal statute "must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2276 (2002) (quoting *Sandoval*, 532 U.S. at 286). Here, the FACA does not provide a distinct remedy and so it is enforceable, if at all, through the APA. The APA limits review to the administrative record and does not reach the Vice President. The more general writ of manda-

mus cannot be used to circumvent those limits on the provision directly providing for review of administrative action. *Cf. Syngenta Crop Protection, Inc.* v. *Henson*, 2002 WL 31453983 (Nov. 5, 2002).

The FACA reveals no congressional intent whatsoever to create judicially enforceable private rights and remedies beyond those available under the APA, which pointedly does not authorize suits against or apply to actions of the President or Vice President. As the Supreme Court and this Court have recognized, application of the FACA to the President and groups in operational proximity to the President raise significant constitutional questions. No basis exists for concluding that the Vice President can be a proper defendant in a suit, by mandamus or otherwise, concerning the application of that statute.

Even where the mandamus statute applies, the granting of mandamus relief is equitable in nature. Where, as here, an ultimate award of mandamus relief on the merits would raise substantial constitutional questions, those same equitable considerations require the conclusion that a court may order discovery in aid of the possibility of such relief—where review of a record compiled by the Executive Branch would otherwise be the norm—only in the most extraordinary circumstances. No such circumstances are present here.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction under 28 U.S.C. § 1651, vacate the discovery orders issued by the district court, direct the

court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct that the Vice President be dismissed as a defendant.

Respectfully submitted,

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
ERIC D. MILLER
(202) 514-5089
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
601 D Street, N.W., Room 9108
Washington, D.C. 20530-0001

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2002, I am causing the foregoing EMERGENCY Petition for Writ of Mandamus to be served on the following in the manner specified:

By Hand delivery:

Honorable Emmet G. Sullivan
United States District Court
for the District of Columbia
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Larry Klayman, Esq.
Paul Orfanedes, Esq.
Judicial Watch, Inc.
501 School Street, S.W.
Suite 725
Washington, D.C. 20024

David Bookbinder, Esq.
Sierra Club
408 C Street, N.E.
Washington, D.C. 20002

Roger Adelman
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Ave., N.W. Suite 700
Washington, D.C. 20009-1035

By Federal Express:

Patrick Gallagher
Alex Levinson
Sanjay Narayan
Sierra Club
85 Second Street
San Francisco, California 94104

Mark B. Stern

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-
[Civil Action Nos. 01-1530, 02-631[EGS]

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, *ET AL.*,
PETITIONERS

EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

The Vice President of the United States, Assistants to the President Joshua Bolten and Lawrence Lindsey, the former National Energy Policy Development Group ("NEPDG"), and former NEPDG Executive Director Andrew Lundquist, who are all defendants in these consolidated cases, respectfully ask this Court for an immediate stay pending review by this Court of the district court's orders permitting discovery against them.

Together with this motion, we are filing a Petition for Writ of Mandamus. The Vice President has separately filed a notice of appeal on November 8, 2002, appealing the court's rulings as of right under 28 U.S.C. § 1291. *See United States* v. *Nixon*, 418 U.S. 683 (1974). The district court denied a stay pending appellate review on November 1, 2002.

Plaintiffs in these actions allege that the NEPDG, an Executive Branch advisory group established by President Bush and headed by Vice President Cheney, operated in violation of procedures established by the Federal Advisory Committee Act ("FACA"), 5 U.S.C.

Appendix 2. As the President's directive establishing the group and the group's final report both make clear, however, the NEPDG consisted wholly of full-time government officers and employees and is therefore exempt from FACA.

Nevertheless, based on the conclusory allegation that someone outside the government might have been accorded membership, the district court has ordered far-ranging discovery into the workings of the group, despite its operational proximity to the President. That discovery includes sweeping interrogatories and document requests to the Vice President and involves intrusions on the Executive far beyond the information that would be disclosed if FACA actually applied.

As we explain in our mandamus petition, the district court committed clear error in permitting this wide-ranging and constitutionally problematic discovery based on mere allegations that the NEPDG had members other than those specified by the President. In particular, the district court erred in refusing to decide this case on the administrative record in accordance with established law; in approving discovery into the workings of a presidentially appointed committee of top-level government officials and into the Office of the Vice President; and in refusing to dismiss the Vice President from this lawsuit. Under the district court's schedule, defendants must respond to plaintiffs' discovery requests by November 29, 2002.

Absent an immediate stay, the government will be unable to obtain effective review of the district court's order. Indeed, compliance with the district court's discovery orders against these defendants will moot their claims that such orders are statutorily impermissible and unconstitutional. Moreover, absent an appellate

decision clarifying that mere allegations concerning "unofficial" members cannot authorize wide ranging and constitutionally problematic intrusions into the Executive Branch, there is a continuing and irreparable chill on the use of committees of Cabinet officers or other top-level officials to advise the President. Accordingly, to permit orderly appellate review, avoid these irreparable injuries, and promote interbranch comity, we respectfully ask that this Court grant an emergency stay pending appellate review.

STATEMENT

President Bush established the NEPDG as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. App. 117. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." App. 118. The NEPDG was given no operational or administrative responsibilities; rather it was directed to "gather information, deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.*

The President directed that the NEPDG consist exclusively of government officers and employees and be chaired by the Vice President. App. 117-18. As the group's final report makes clear, the group was, consistent with the President's directive, composed exclusively of federal officers and employees. *See Reliable, Affordable, and Environmentally Sound Energy For America's Future: Report of the National Energy*

Policy Development Group ("Report") (available at www.whitehouse.gov/energy).

The Supreme Court has gone to great lengths to impose limits on the FACA to maintain its constitutionality. *See Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989). The FACA itself has a statutory limitation that limits potential unconstitutional intrusions on the Executive: it does not apply to committees that are composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 2 § 3(2). The district court nevertheless denied the government's motion to dismiss plaintiffs' complaints, reasoning that it was sufficient for plaintiffs to allege that the President's specification of the group's membership and the group's own confirmation of its membership, as reflected in formal administrative documents, was inaccurate. App. 151-52. The court then denied the government permission to file a motion for summary judgment, concluding that the case should not be decided on the basis of an administrative record. App. 173. The court also refused to dismiss the Vice President as a party, choosing instead to assume for purposes of further proceedings that mandamus review of his actions might be available at the end of the day. App. 169.

The court then approved a broad discovery plan that allows production of documents and information far beyond what would be obtained on the merits if plaintiffs ultimately prevailed on their FACA claim. App. 238. These include communications between individual NEPDG members outside the context of group meetings, between NEPDG members and agency personnel, and between members and outside individuals. *See, e.g.*, App. 246, Request for Production No. 3; App. 251,

253, Plaintiffs' First Set of Interrogatories at 2, ¶ B, and Interrogatories Nos. 3, 4.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established APA procedure. In addition, the government submitted a declaration of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy and former Deputy Executive Director of NEPDG, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." App. 257. Ms. Knutson's affidavit confirmed that all members of the NEPDG, and persons who attended the NEPDG's meetings, were government officers or employees. She also explained that all participants in the staff group were government employees, with the exception of one communications consultant who provided technical, non-substantive assistance to the staff group and who attended only minor portions of several of the numerous meetings that the other members of the staff had. *See* App. 261-62, Declaration of Karen Y. Knutson, ¶¶ 10, 13.

The court denied the government's motion and declined to allow the government to file a motion for summary judgment. App. 264. The court denied the government's motion for a stay pending appellate review on November 1, 2002, App. 371, and has ordered that the government comply with the discovery requests by November 29, 2002, App. 372.

REASONS WHY A STAY SHOULD BE GRANTED

Under the familiar stay standards, a Court must consider the movant's likelihood of success on appeal, the balance of harms and the public interest. *Washington Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). "A stay may be granted with either a high probability of success and some injury, or vice versa." *Cuomo* v. *United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). Where the movant has established substantial irreparable harm and the balance of harms weighs heavily in its favor, it need only raise "serious legal questions going to the merits" to obtain a stay pending appeal. *Population Inst.* v. *McPherson*,797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting *Washington Metro. Area Transit Comm'n*, 559 F.2d at 844); *see also Providence Journal Co.* v. *Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (where "the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay").

The government has a substantial likelihood of prevailing on appeal and in its request for mandamus relief. In addition, its ability to obtain meaningful appellate review will be vitiated absent a stay. Moreover, the decision below permits substantial interference with intra-Executive Branch efforts to advise the President and so interferes with such efforts in a manner clearly contrary to the public interest.

I. Probability of Success On the Merits.

As detailed further in our petition, the district court's order finds no basis in FACA and contravenes fundamental principles of administrative law and interbranch comity. Even in the context of meetings concededly involving *non*-governmental personnel who offer advice to the President, the Supreme Court has adopted a construction of FACA that this Court described as "extremely strained," *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 906 (D.C. Cir. 1993), in order to avoid an unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. FACA's textual exemption of committees made up exclusively of governmental officials is even more critical in avoiding unconstitutional interference with the Executive. Nevertheless, the decisions below eliminate this key textual protection as a practical matter by allowing discovery of material that not only duplicates but goes well beyond the information that would be made public if FACA actually applied to the group—all upon the mere allegation that, contrary to the President's express directive, there was a non-governmental member of the committee. The correct application of traditional principles of judicial review avoids this constitutionally problematic result. However, the decisions below disregard this principle.

As the district court properly recognized, the FACA confers no private right of action. An action alleging that federal officials failed to comply with the FACA must ordinarily proceed under the APA. The APA does not apply to the President or Vice President, but the district court concluded that it might have authority to review the Vice President's exercise of his

presidentially assigned responsibilities concerning the NEPDG under the mandamus statute. But the district court erred in its application of the APA and mandamus, by assuming mandamus review would be available at all with respect to the Vice President in a case such as this. Judicial review in either case is limited to the administrative record. *See, e.g., Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).[1] The President and Executive Branch agencies routinely create intragovernmental working groups and task forces to address a broad range of issues. Neither the FACA nor the APA contemplates discovery into the workings of these groups based on bare assertions that the groups should have been established under FACA.

The error of permitting such discovery is particularly clear when a policy group, led by the Vice President, is established by the President from among the Heads of Departments and his closest advisors to report directly to him in the conduct of core executive functions. Permitting discovery into the conversations and contacts of that group, including the Vice President himself, and conversations between individual members of the group and outsiders, constitutes a significant intrusion raising serious constitutional concerns. In particular, the Vice President of the United States respectfully but resolutely maintains, in the circumstances of this case, that

---

[1] A plaintiff cannot circumvent the limitations on APA review by stating a parallel claim for mandamus. Indeed, the principle of confining review to the administrative record predates the APA, *see Texas Rural Legal Aid, Inc.* v. *Legal Services Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991), and thus governs claims for mandamus as well.

extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President raises separation of powers problems of the first order.

The district court's premise in permitting discovery was that "the government doesn't always comply with the law." App. 217 (Tr. of Aug. 2, 2002 Hearing). By this, the district court apparently meant that plaintiffs' claims could not be adjudicated on the basis of the administrative record or supplemental declarations filed by the government because of what it regarded as an ever-present *possibility* of irregularities (unsupported by any specific evidence in this case). This stands established principles on their head. Agency proceedings are accorded a presumption of regularity, and allegations of bad faith justify discovery only upon a strong preliminary showing that misconduct has occurred. *See United States Postal Service* v. *Gregory*, 122 S. Ct. 431, 436 (2001); *United States* v. *Armstrong*, 517 U.S. 456, 463-65, 468-70 (1996); *American Federation of Government Employees, AFL-CIO* v. *Reagan*, 870 F.2d 723, 727-28 (D.C. Cir. 1989). That showing plainly has not been made here, and the court's departure from settled law constitutes manifest and significant error.

The district court compounded this error by allowing discovery of the Vice President and others with the closest proximity to the President, especially where the plaintiffs have not made any attempt to demonstrate a substantial need for that discovery. Erroneously concluding that defendants "have cited no authority" to support their argument, the district court ignored authority, cited to the district court by defendants, in

which courts have, in fact, required such a substantial showing of need before permitting discovery against the highest reaches of the Executive Branch. *See United States* v. *Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990) (applying the "particularly meticulous" standard to require a showing of need prior to the invocation of privilege with respect to a request for presidential testimony); *United States* v. *Poindexter*, 727 F. Supp. 1501, 1503-06 (D.D.C. 1989) (applying similar requirement for document subpoena).[2]

The district court's error is further compounded by its refusal to dismiss the Vice President as a party. The Vice President is not an "agency" within the meaning of the APA, and the scope of non-statutory review recognized by this Court does not extend either to actions directly against the Vice President or to the type of error alleged in this case.[3]

---

[2] Defendants also cited cases in related contexts in which the Supreme Court and other circuit courts have applied a strict "need" standard before allowing discovery against the Executive Branch or where potentially privileged material was involved. *United States* v. *Armstrong*, 517 U.S. 456 (1996) (requiring plaintiffs to demonstrate need before permitting discovery against federal prosecutors on selective prosecution theory); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (requiring plaintiffs to make threshold demonstration before allowing discovery on qualified immunity claim). *See also United States* v. *Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (requiring demonstration of need where potentially privileged documents implicated by discovery request) (cited in *Poindexter*, 727 F. Supp. at 1505 n.8).

[3] Indeed, the Supreme Court recently ruled that a plaintiff who seeks to invoke an implied private right of action under a federal statute "must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2276 (2002) (quoting *Alexander* v.

The district court itself repeatedly recognized that the questions presented here "are very important," App. 299 (Tr. of Oct. 17, 2002 Hearing). *See also* App. 323 (Tr. of Oct. 31, 2002 Hearing (recognizing that "this is a very important case")); App. 171 (July 11, 2002 Opinion (recognizing "the seriousness of the constitutional challenge raised by defendants to the application of the FACA")). Nonetheless, the district court denied the moving defendants' motion for a stay on the ground that they have no likelihood of success. App. 366-68 (November 1, 2002, Order). The court's conclusion is inconsistent with its own prior pronouncements and erroneous.

II. Balance of Harms and The Public Interest.

Absent a stay, the government will be unable to obtain meaningful appellate review of the serious constitutional and statutory issues implicated by the court's rulings. The district court itself recognized that "if defendants' premise is accepted [by the Court of Appeals] that compliance with this Court's discovery order imposes an unconstitutional burden, defendants would suffer irreparable harm if the proceedings before this Court were not stayed to enable them to seek appellate review of such an order." App. 369-70 (November 1, 2002 Order at 6-7). The grant of a stay is essential to maintain the appellate court's ability to exercise its proper authority over lower court rulings—"perhaps

---

Sandoval, 532 U.S. 275, 286 (2001). Where, as here, the underlying statute does not create a private right of action, and where the statute that *does* furnish a right of action to enforce the FACA—namely, the APA—does not apply to the President or Vice President, the federal mandamus statute cannot provide a means of enforcement of the FACA.

the most compelling justification" for the grant of a stay. *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers, granting stay as Circuit Justice for the Second Circuit). *See also Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (because "[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable," an appellate court should normally grant such a stay, if the issues raised are substantial, to prevent confidentiality from being "lost for all time").

More broadly, the decision below injures the Executive Branch and the public interest by chilling intra-Executive Branch efforts to advise the President. The decision below has the practical effect of eliminating FACA's textual exemption of committees made up solely of governmental officials. It allows any litigant to trigger discovery that is largely duplicative of or even more intrusive than the remedies for a FACA violation —both in scope and constitutional difficulty—based on a mere allegation of unofficial members distinct from the membership prescribed by the President.

We ask that a stay be entered at the earliest possible time. Complying with plaintiffs' requests imposes a significant burden on the Vice President and officials in his office and entails the very intrusion into the Presidency and the Vice Presidency that the Vice President and other defendants seek to have adjudicated as unconstitutional and otherwise unwarranted. These officials should not be distracted from their responsibilities, nor suffer the very harms that they seek on appeal to have adjudicated as unconstitutional and otherwise unwarranted, unless and until this Court approves the district court's determination to permit discovery.

Conversely, plaintiffs will experience no harm as a result of a stay. We are seeking highly expedited review in this Court, and any delay resulting from the stay will be minimal. Similarly, the public interest will be best served if this court stays, pending appellate adjudication, the lower court's orders, which entail substantial burdens on and distraction of high-level, and which effect the very type of intrusion into the functioning of the Presidency and the Vice Presidency that defendants seek to have this Court adjudicate on appeal.

CONCLUSION

For the foregoing reasons, this Court should stay discovery in this case pending appellate review.

Respectfully submitted,

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
ERIC D. MILLER
(202) 514-5089
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
601 D Street, N.W. Room 9108
Washington, D.C. 20430-0001

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2002, I am causing the foregoing EMERGENCY Motion for A Stay Pending Appellate Review to be served on the following in the manner specified:

By Hand delivery:

Honorable Emmet G. Sullivan
United States District Court
for the District of Columbia
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Larry Klayman, Esq.
Paul Orfanedes, Esq.
Judicial Watch, Inc.
501 School Street, S.W., Suite 725
Washington, D.C. 20024

David Bookbinder, Esq.
Sierra Club
408 C Street, N.E.
Washington, D.C. 20002

Roger Adelman
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Ave., N.W. Suite 700
Washington, D.C. 20009-1035

By Federal Express:

Patrick Gallagher
Alex Levinson
Sanjay Narayan
Sierra Club
85 Second Street
San Francisco, California 94104

Mark B. Stern

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 01-1530 (EGS)
JUDICIAL WATCH, INC., PLAINTIFF
v.
NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANT

Civ. Action No. 02-631 (EGS)
SIERRA CLUB, PLAINTIFF
v.
VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

Pending before this Court is non-agency defendants' motion for certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Upon careful consideration of this motion, the responses and reply thereto, the applicable statutory and case law, and for the following reasons, the defendants' motion is hereby **DENIED.**

I. BACKGROUND

Defendants Vice-President Richard B. Cheney, the National Energy Policy Development Group "NEPDG"), Andrew Lundquist, Joshua Bolten, and

Larry Lindsay[1] have recently filed with the United States Court of Appeals for the District of Columbia Circuit a series of appeals of this Court's July 11, 2002, August 2, 2002, September 9, 2002, October 17, 2002, and November 1, 2002 Orders.

On November 7, 2002, defendant Vice-President Richard Cheney filed a notice of appeal of this Court's November 1, 2002, October 17, 2002, and September 9, 2002 Orders approving discovery of him by plaintiffs. These Orders, *inter alia*, require him to produce non-privileged documents responsive to plaintiffs' First Request for Production of Documents or file detailed and precise objections to particular requests with the Court. The defendant was also directed to produce a privilege log identifying with specificity the documents or categories of documents withheld pursuant to an asserted privilege, as well as the grounds therefor. Mr. Cheney appeals these Orders as "final orders" under what defendants have dubbed the "Nixon rule." Defs.' Mot. at 3. Defendant premises the Court of Appeals' jurisdiction for such an appeal on the Supreme Court's ruling in *United States* v. *Nixon* deeming a discovery Order denying a motion to quash a subpoena *duces tecum* directed to the President of the United States a "final order" for the purpose of bringing its appeal within the reach of 28 U.S.C. § 1291. *United States* v. *Nixon*, 418 U.S. 683, 690-92, 94 S. Ct. 3090, 3098-99 (1974). This narrow rule was adopted by the *Nixon* Court to avoid the "unseemly" circumstance in which

[1] For ease of reference, these individuals will be referred to throughout this opinion as either "non-agency defendants," or "defendants," to distinguish them from the federal agency defendants who have not joined in this motion.

the President of the United States would be forced to disobey the Judicial Branch to obtain appellate review of its orders. *Id.* at 692.

The so-called "Nixon rule" appears to have been applied only in *United States* v. *Nixon*, and defendants seem to concede that it has never been applied to the Office of the Vice-President. *See* Defs.' Reply in Supp. of Mot. for a Stay at 3. Mr. Cheney argues for an extension of *Nixon*'s holding to this case, contending that the underlying rationale applies with equal force to the Vice-President, rendering this Court's discovery Orders "final orders" subject to appellate review pursuant to § 1291, at least as applied to Vice-President Cheney. *Id.*

Additionally, on November 12, 2002, all five non-agency defendants filed an Emergency Petition for Writ of Mandamus with the Circuit Court, seeking review of this Court's Orders authorizing discovery of them. Defendants allege that these Orders reflect "clear error" on this Court's part, and urge the Court of Appeals to order this Court to dismiss Vice President Cheney from this action, and to decide this case on the basis of the administrative record alone, without the benefit of further discovery. Emergency Mot. for Stay at 2; Emergency Pet. for Writ of Mandamus at 1, 8.

Notwithstanding this flurry of appellate activity, non-agency defendants have also filed a motion before this Court to certify three issues for interlocutory appeal to the United States Court of Appeals for the D.C. Circuit. Defendants argue that they are entitled to pursue all three avenues of appeal, but urge this Court to grant their motion for certification pursuant to § 1292(b) in order to afford the Court of Appeals "more options to consider in determining whether and how

. . . it is going to take the case, because interlocutory appeal would be a more traditional way for the Court to examine the issues rather than the Nixon theory or mandamus." Tr. 11/13/02 Hr'g. at 28:22 - 29:5; Defs.' Reply in Supp. of Mot. for Stay at 2-4. However, as plaintiffs correctly point out, convenience alone is not a ground for granting certification under § 1292(b). *See* Tr. 11/13/02 Hr'g. at 33:11 - 33:17. A party must establish a factual and legal predicate under the standard set forth in 28 U.S.C. § 1292(b) in order for a question to be properly certified for interlocutory appeal, a prerequisite defendants have failed to satisfy in this case.

II. MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

Defendants contend that they are entitled to certification of this Court's July 11, 2002, August 2, 2002, September 9, 2002, and October 17, 2002 Orders for immediate appeal pursuant to 28 U.S.C. § 1292(b) to resolve the following questions of law:

> 1) whether the Federal Advisory Committee Act ("FACA") is enforceable against the Vice President through an action for *mandamus*;
>
> 2) whether a private plaintiff may obtain discovery of the Vice President and other non-agency defendants in a civil case "absent any showing of need;"
>
> 3) whether, "in light of principles of judicial review established by the Administrative Procedure Act ("APA"), and in light of the constitutional concerns raised by plaintiffs' suit and requests for discovery, this case should be dismissed or resolved on the basis of the administrative record."

Defs.' Mot. for Certification at 2.

A. Standard of Review

A District Court may certify an interlocutory order for immediate appeal if it concludes that it

> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation.

28 U.S.C. § 1292(b); *Trout* v. *Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). Through § 1292(b), "Congress . . . chose to confer on District Courts first line discretion" and "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable." *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 46, 47, 115 S. Ct. 1203, 1210 (1995).

In an opinion relied upon by both parties, the Seventh Circuit described a "controlling" question of law as one which

> will determine the outcome or even the future course of the litigation . . . a question is controlling, even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.

Johnson v. *Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991). One District Court within this Circuit has held:

> Under section 1292(b), a controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course

> of litigation with resulting savings of the court's or the parties' resources.

In re Vitamins Antitrust Litigation, Civ. A. No. 99-197, 2000 WL 673936 at *2 (D.D.C. Jan. 27, 2000).

The threshold for establishing the "substantial ground for difference of opinion" with respect to a "controlling question of law" required for certification pursuant to § 1292(b) is a high one. The parties cite to only one instance within this Circuit in which a court found that it had been met, based on the existence of an apparent inconsistency between a position taken by one panel of the Court of Appeals when remanding to the District Court and that set forth in a prior Circuit opinion. *See Johnson* v. *Wash. Metro Area Trans. Auth.*, 773 F. Supp. 459, 460 (D.D.C. 1991). In another case, not cited by either party, a District Court found that, although the plain statutory language governing a jurisdictional issue could be read consistently with a prior Circuit opinion, certain language in the appellate court opinion "could be seen as in tension with the plain wording of the statute," thereby creating the factual and legal predicates for certification for interlocutory appeal pursuant to § 1292(b). *Carr Park, Inc.* v. *Tesfaye*, 229 F.3d 1192, 1193-94 (D.C. Cir. 2000). In the more traditional case, such as this one, where the party moving for certification pursuant to § 1292(b) disagrees with a court's order denying a motion to dismiss and granting discovery, other District Courts within this Circuit have stated unequivocally that

> Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a "substantial ground for difference of opinion" sufficient to satisfy the statutory requirements for an interlocutory appeal.

First Am. Corp. v. *Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996); *see also In re Vitamins Antitrust Litigation*, 2000 WL 673936 at *3.

A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States* v. *Nixon*, 418 U.S. at 690. "Although courts have discretion to certify an issue for interlocutory appeal, interlocutory appeals are rarely allowed . . . the movant 'bears the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'" *Virtual Def. and Dev. Int'l, Inc.* v. *Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (quoting *First Am. Corp.* v. *Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996)). The "law is clear that certification under § 1292(b) is reserved for truly exceptional cases." *In re Vitamins Anti-Trust Litigation*, 2000 WL 673936 at *1 (citing *Tolson* v. *United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984)). Defendants have fallen far short of demonstrating that the questions of law presented by the challenged Orders arise under such exceptional circumstances as to warrant disruption of the favored process of appellate review following final judgment.[2]

---

[2] It is significant that this Circuit has commented, in *dicta*, that certification pursuant to § 1292 is particularly appropriate "when claims of immunity" are at issue. *McSurely* v. *McClellan*, 697 F.2d

B. Enforcement of FACA against Vice-President through mandamus relief

Defendants contend that "it is appropriate to allow the court of appeals at this time to determine" the question of whether FACA is enforceable against the Vice President by way of an action for *mandamus* because early dismissal of the Vice President from this action would eliminate thorny constitutional issues posed by his presence. *See* Defs.' Mot. for Certification at 7. Defendants further argue that dismissal of the Vice-President, in turn, would "materially advance" the litigation, thus rendering this question a "controlling" one for the purposes of § 1292(b) analysis under the case law cited by both parties. *Id.*

As an initial matter, while dismissal of the Vice-President at this point in the litigation would certainly bring the litigation to a swift conclusion as to this particular defendant, it does not appear that it would eliminate constitutional concerns from this case altogether, nor materially advance the litigation. Defendants have continuously and vehemently contended that discovery is inappropriate as to *all* non-agency defendants, and not just the Vice-President, due to the separation of powers concerns defendants maintain are triggered by any and all discovery of the National Energy Policy Development Group ("NEPDG") and other non-agency defendants. Assuming the nonagency defendants other than the Vice-President do not change

309, 316 n.12 (D.C. Cir. 1982). Nevertheless, given that it is executive privilege, not immunity from suit, which is at issue here, even if this statement were not *dicta*, it still would not bring this case within the realm of "exceptional circumstances" justifying certification for interlocutory appeal.

their position in this regard, dismissal of the Vice-President as a defendant from this case would neither remove nor expedite the resolution of the complex constitutional issues presented.

Moreover, because the Orders defendants seek to certify for appeal concern only discovery reasonably calculated to ascertain whether FACA is even applicable here, it is premature to characterize the question of whether this Court can grant *mandamus* relief ordering compliance with FACA as a "controlling" question of law. Additionally, the Court's July 11, 2002 Memorandum Opinion & Order did not resolve the question of whether *mandamus* relief was available against the Vice-President for a violation of FACA. *Judicial Watch* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 1483891 at *21-22 (D.D.C. Jul. 11, 2002). The Court deferred a decision on that issue until it could be ascertained, by means of carefully limited discovery, whether FACA's non-discretionary duties fell exclusively on the Vice-President's shoulders, and, if so, whether issuance of a writ of *mandamus* to him would be an appropriate exercise of this Court's discretion in light of the facts unearthed through discovery. *Id.* Furthermore, "since the controlling question of law ha[s] not yet been resolved by the court . . . [n]o substantial ground for difference of opinion exist[s]." *In re Vitamins Anti-Trust Litigation*, 2000 WL 673936 at *1.

Even if the issue were before the Court at this stage of the litigation, it is quite clear that the question defendants seek to certify is not one as to which, at least in the hypothetical presented in the absence of a more developed factual record, there is "substantial ground for difference of opinion." *See Judicial Watch* v. *Nat'l*

Energy Policy Dev. Group, 2002 WL 1483891 at *21-22 ("Defendants cite no cases in support of their argument . . . [and] ignore[] the Supreme Court's guidance . . ."). Defendants correctly state that *mandamus* review is a "'drastic' remedy, 'to be invoked only in extraordinary situations.'" *Consolidated Edison Co.* v. *Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002). However, the fact that invocation of a procedure is highly unusual does not, in and of itself, create a "substantial ground for difference of opinion" on the question of its potential applicability under certain circumstances. Additionally, precedent from this Circuit has consistently held that *mandamus* relief against Executive Officers, up to and including the President of the United States, is available to enforce performance of non-discretionary statutory duties. *See, e.g., Nat'l Wildlife Fed'n* v. *United States*, 626 F.2d 917, 923 (D.C. Cir. 1980) ("Where a federal official has a clear obligation to perform a ministerial duty, a federal district court may issue a writ of mandamus under 28 U.S.C. section 1361 to compel the fulfillment of the obligation. Mandamus is not precluded because the federal official at issue is the President of the United States."); *Nat'l Treasury Employees' Union*, 492 F.2d 587 (D.C. Cir. 1974). Defendants have not yet established, as a matter of law, that the requisite conditions for *mandamus* relief do not and cannot exist in this case. Accordingly, this Court has held that discovery is necessary to assist in determining whether the particular factual circumstances presented by these cases justify issuance of the writ notwithstanding its "drastic" nature. *See Judicial Watch* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *21-22. Defendants have failed to even suggest that there is a "substantial ground for difference of opinion,"

based on controlling authority, as to the propriety of such a course of action.

Defendants' reliance on cases from other Circuits holding *mandamus* relief to be unavailable where a statute creating a nondiscretionary duty does not provide for a private right of action does not change this result. *See* Defs.' Mot. for Certification at 8. It is not unusual that Circuits differ with respect to the proper resolution of legal issues deemed controlling in a particular case. If interlocutory appeals were to be granted in every such instance, our system's strong preference for appeal only upon final judgment would be severely undermined. Indeed, in view of this Circuit's opinion in *Chamber of Commerce* v. *Reich*, 74 F.3d 1322 (D.C. Cir. 1996), which represents the current, undisputed law of this Circuit, there is no "substantial ground for difference of opinion" on this question for the purposes of § 1292(b) analysis. Even if defendants' assertion that there is a need for further clarification of the limits of *mandamus* review within this Circuit is accepted as true, defendants have offered no reason why such clarification cannot take place upon appellate review after final judgment rather than through the disruptive process of interlocutory appeal. *See* Defs.' Mot. at 8.

Defendants' citation to the recently decided case of *Gonzaga University* v. *Doe* for the proposition that *mandamus* relief is unavailable as a matter of law in this case is equally unpersuasive. See Tr. 11/13/02 Hr'g. at 28:17 - 28:21; Defs.' Mot. for Certification at 8. In *Gonzaga*, the U.S. Supreme Court clarified its precedent with respect to enforcement, through actions brought under 42 U.S.C. § 1983, of conditions placed on receipt of federal funding in federal statutes enacted

pursuant to the Spending Clause. *Gonzaga Univ.* v. *Doe*, ___ U.S. ___, 122 S. Ct. 2268, 2272-75 (2002). *Gonzaga*'s expansion of the discussion in *Alexander* v. *Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), regarding the recognition of implied private rights of action in the absence of express statutory language or Congressional intent, does not create a "substantial ground for difference of opinion" with respect to the approach adopted by this Court in the present case. *See Gonzaga Univ.* v. *Doe*, 122 S. Ct. at 2277. In fact, this Court expressly followed *Sandoval* in holding that no private right of action can be implied under FACA, thereby adhering to the very line of cases defendants now point to as creating a sufficient basis for interlocutory appeal. *Judicial Watch* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *10-12.

Furthermore, the Supreme Court opinion in *Gonzaga*, at its core, concerned the entirely distinct question of how courts should go about ascertaining whether a personal right triggering the application of 42 U.S.C. § 1983 exists. *Gonzaga Univ.* v. *Doe*, 122 S. Ct. at 2276-77. While instructive, this discussion has little or no appliation to the question of whether a statute creates a non-discretionary duty triggering the potential application of the federal *mandamus* statute, 28 U.S.C. § 1361. Defendants' efforts to equate implied personal rights, or implied rights of action, the subjects of the *Gonzaga* opinion, with an action pursuant to the federal *mandamus* statue for failure to perform a non-discretionary duty created by statute represent, at best, an argument by analogy for extension of the law, and are insufficient to create a "substantial ground for difference of opinion," as that term is used in § 1292(b), justifying immediate resolution of the applicability of the *mandamus* statute in this case.

Defendants have failed to establish the existence of a "substantial ground for difference of opinion" with respect to the question of whether the federal *mandamus* statute offers a means by which FACA could be enforced against the Vice President. Accordingly, certification of this question is inappropriate under § 1292, given the conspicuous absence of one of the policy considerations favoring application of the exceptional procedure of interlocutory review prior to final judgment.

C. Availability of Discovery "Absent Any Showing of Need"

Defendants also contend that the second question for which they seek certification, "whether a private plaintiff may obtain discovery . . . absent any showing of need," is "substantial and controlling," and therefore meets the standard for certification under § 1292(b). Once again, defendants fail to establish the factual and legal predicates for interlocutory appeal of this Court's discovery Orders pursuant to § 1292(b).

As an initial matter, the parties disagree as to whether a District Court's discovery orders are, as a general rule, the proper subject of an interlocutory appeal. Plaintiff Sierra Club contends that they are not, relying on the Eighth Circuit's opinion in *White* v. *Nix*, which suggests that discovery orders "generally never will involve a controlling question of law." *White* v. *Nix*, 43 F.3d 374, 377 (8th Cir. 1994) (citation omitted). In *Nix*, the Eighth Circuit denied, as improvidently granted, review under § 1292(b) of a District Court order requiring production of documents under condi-

tions set out in a protective order. The court held that because the nature and scope of discovery is committed to the sound discretion of the trial court, allegations of abuse of that discretion do not create legal issues or raise the types of legal questions for which interlocutory review pursuant to § 1292(b) would be appropriate. *Id.* Defendants counter that there is no "blanket rule" precluding interlocutory appeal of discovery orders, reasoning that this Circuit has found such orders to be a potentially appropriate subject of the far more drastic remedy of *mandamus*. Tr. 11/13/02 Hr'g. at 30:1 - 30:3; Defs.' Reply at 4, both citing *In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000) [hereinafter "*EOP*"]. Defendants further argue that interlocutory review is particularly appropriate where, as here, interlocutory orders raise complex and "serious" constitutional issues. Defs.' Mot. at 5; *Cf. EOP*, 215 F.3d at 23 ("disclosure of highly privileged material followed by appeal after judgment is obviously not adequate in such cases—the cat is out of the bag.").

This Court does not dispute that defendants' constitutional challenges to the application of FACA and the APA in this case are "serious." *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *22. "Rather, it is out of concern for the seriousness of this issue that this Court has determined that proceeding to discovery is appropriate." *Id.* The Court has held development of the factual record through the discovery ordered in this case necessary to decide the serious issues before it. *Id.* at *31-32.

However, § 1292 jurisprudence does not appear to equate any issue susceptible to a separation of powers argument with a "controlling" question of law as that

language is used in § 1292(b). If an argument, even one that invokes separation of powers doctrine, is without support in existing case law, then the questions of law raised thereby are neither substantial nor controlling for the purposes of § 1292(b) analysis. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *26, 27. Moreover, even if defendants' arguments for a dramatic expansion of the current separation of powers doctrine are ultimately found to be persuasive, § 1292(b) "was not intended merely to provide review of difficult rulings in hard cases." *United States ex rel Hollander* v. *Clay*, 420 F. Supp. 853, 859 (D.D.C. 1976). Defendants' legal arguments, and this Court's rulings on these serious constitutional questions, can just as easily, and more appropriately, be reviewed upon entry of final judgment.

Interlocutory appeal is reserved for "extraordinary cases," and not every case presenting constitutional questions, nor every case permitting discovery requests to be made of Executive Officers, meets this admittedly high standard. *See Clinton* v. *Jones*, 520 U.S. 681, 702, 705, 117 S. Ct. 1636, 1648, 1650 (1997); *EOP*, 215 F.3d at 23. For instance, in *EOP*, the Court of Appeals declined to hear an interlocutory appeal, pursuant to § 1292(b), of the District Court's denial of a motion to dismiss premised on the argument that the Privacy Act did not apply to the Executive Office of the President. *Id.* at 23. In so doing, the Circuit impliedly held that allowing such a case to proceed to discovery and follow established appellate procedures was appropriate notwithstanding the parties involved or the constitutional issues presented. *Id.* The Circuit also denied the government's petition for *mandamus* review of a subsequent discovery order, expressly com-

menting on the sufficiency of appellate review upon final judgment to resolve the "serious" constitutional issues presented. *See* id. at 25.

The Circuit's reasoning in *EOP* is applicable to the motion currently before this Court. In both cases the Executive Branch contends that it is not properly subject to a statute, and that discovery in an action brought to enforce the statute is improper. *See id.* at 21. In *EOP*, defendants had asserted privileges which both the District and Circuit Courts found to be without merit. *Id.* at 22. In the present case, defendants have refused to even review responsive documents and make specific objections and assertions of privilege. Notwithstanding this difference in the underlying facts, in both cases defendants offered "no argument that [they] are even entitled to the privileges." *Id.* at 23-24. Accordingly, these cases are sufficiently analogous for this Court to conclude that there are no "extraordinary circumstances" here requiring resolution on interlocutory appeal.

Additionally, defendants have not succeeded in establishing that there is a "substantial ground for difference of opinion" on the question of whether any discovery requests can be made of presidential advisors or the Vice-President without first showing "any need." As this Court has repeatedly stated, defendants mischaracterize the authority they cite for the proposition that a private party seeking discovery from the Vice-President and presidential advisors must first show a "compelling need," beyond the "mere allegations" sufficient to survive a motion to dismiss, for the information sought. After considerable briefing by all parties, this Court concludes that there is no legal precedent for defendants' position that the discovery procedures

adopted by this Court place an unconstitutional burden on them. Thus, there can be no "substantial ground for difference of opinion" justifying interlocutory appeal on this issue. Moreover, defendants appear to have conceded, both at oral argument on this motion and in their recent briefings, that the real difference of opinion lies between the defendants themselves and the Court, rather than within precedential authority. Tr. 11/13/02 Hr'g. at 30:21 - 30:25. As noted by the District Court in *Al-Nahyan*, "[t]he mere claim that a decision has been wrongly decided is not enough to justify an interlocutory appeal." *First Am. Corp* v. *Al-Nahyan*, 948 F. Supp. at 1117.

Defendants argue that this Court has failed to consider two D.C. District Court opinions which create the requisite "substantial difference of opinion" on the question of whether executive privilege must first be asserted before a party seeking discovery is required to show "need." Defs.' Reply at 2-4, 5 citing *United States* v. *Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990) [hereinafter "*Poindexter II*"]; *United States* v. *Poindexter*, 727 F. Supp. 1501, 1507-08, 1509 (D.D.C. 1989) [hereinafter "*Poindexter I*"]. In fact, the Court has simply found them inapposite, and easily distinguishable from the facts before it. It is true that, in the two *Poindexter* opinions cited by defendants, executive privilege had not first been asserted before a party seeking discovery was required to make any showing prior to obtaining discovery. However, the showing the party seeking discovery was required to make was not one of "need," but rather one of materiality and relevance pursuant to the applicable federal rules. *See Poindexter I*, 727 F. Supp. at 1509, *Poindexter II*, 732 F. Supp. at 147, both citing Fed. R. Crim. P. 17(c). The

party seeking discovery in that case was never required to do anything more than plaintiffs were required to do here with respect to submission of a proposed discovery plan: demonstrate that the documents and information sought are material and relevant to the legal questions before the Court. Additionally, the *Poindexter II* opinion expressly rejects a position similar to that taken by defendants here, stating

> Equally erroneous is the argument of counsel for former President Reagan and Department of Justice counsel acting on behalf of President George Bush . . . [who] assert that, in addition to showings of relevancy, materiality, and other incidents of admissibility, defendant is required to demonstrate that the testimony of the former President is central to his defense, and that a substitute from any other source would be inadequate . . . the precedents cited for this proposition do not support it. *The proposed standard would be extraordinary in a case where executive privilege has been invoked; it is particularly so in a non-privilege situation.* [emphasis added].

Id. at 146-47. Once again, the defendants have misrepresented precedent in order to fit it within their theory that a party must make some showing of "need" before an Executive Branch defendant should be even required to review documents responsive to a Court-approved discovery request, and to determine if viable grounds for assertion of a privilege exists.

The most recent *Poindexter* opinion sets forth the appropriate standard to be applied when deciding whether a criminal defendant's *subpoena* of both former and current Presidents to testify at trial should be

honored. *Poindexter II*, 732 F. Supp. at 146. The District Court held that

> While the former President has not claimed executive privilege, he will only be compelled to testify at the trial of this case if the Court is satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested. [emphasis added]

Id. at 147. The District Court reasoned that a contrary holding could infringe on the Executive Branch's deliberative processes if the President could subsequently be compelled to testify "with frequency and for non-essential or relatively trivial reasons." *Id.* at 147-48. Further, because the testimony subpoenaed might involve both privileged and non- privileged conversations, the District Court was mindful of the potential consequences of establishing a rule effectively requiring the President to assert executive privilege with respect to all conversations in order to avoid being called to testify, particularly in light of the Supreme Court's cautionary instruction that the executive privilege should not be "lightly invoked." *Id.* at 148 (citing cases).

The circumstances before the court in *Poindexter II* are easily distinguishable, on several grounds, from those extant in this case. A decision by the District Court in *Poindexter II* to enforce a subpoena requiring the President to testify at a trial would be analogous to a decision in this case requiring defendants to produce forthwith all of the documents requested by plaintiffs. No such Order has been entered in this case. In fact,

this Court has made it abundantly clear that it is not, at this stage, requiring production of any privileged documents. With respect to document production and responses to interrogatories, as opposed to subpoenas for live testimony, courts have approved, and this Court has adopted, procedures which allow the President and Executive Branch officials to first identify which documents are properly the subject of an invocation of executive privilege and which are not, and to produce the latter, but not the former. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 31519674 at *3 (D.D.C. Nov. 13, 2002) (citing cases).

Second, the implications of honoring a subpoena requiring the President to physically appear and testify before a Court are significant in terms of potential interference with the Presidential function, as noted by the *Poindexter II* opinion. Such a requirement is substantially different from an order requiring Executive Branch staff members to review documents responsive to a discovery request, identify those which are privileged, and produce non-privileged documents and a privilege log, a procedure approved by the Supreme Court. *See, e.g., Nixon* v. *Administrator of General Services*, 433 U.S. 425, 439-55 (1977). Moreover, this Court has already determined, both in its July 11, 2002 Order, and at a subsequent hearing with respect to plaintiffs' proposed discovery plan, that the discovery sought is material and necessary, and therefore meets the standard enunciated in *Poindexter II*, which defendants seek to apply in this case under dramatically different circumstances. *See* Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32.

In the first *Poindexter* opinion, addressing subpoenas for a President's diaries and personal notes in a criminal prosecution, the District Court also did not, as defendants contend, require that the party seeking enforcement of the subpoena establish a "compelling need" for the documents before the subpoena could issue. *See Poindexter I*, 727 F. Supp. at 1507-08, 1509. Rather, proceeding expressly pursuant to the Federal Rules of Criminal Procedure, as it would with respect to any other request for a subpoena not involving the President, the court simply narrowed the scope of subpoenas "to eliminate demands that request documents defendant can obtain from other sources, that are unduly broad or oppressive, or that ask for documentary evidence that is clearly not material to the defense" before issuing them. *Id.* Where portions of the subpoenas were quashed, the *Poindexter I* court did so largely because the information requested was no longer in the President's possession, had already been provided to the defendant, or was available from other sources. *Id.* at 1508-10. Where the defendant was unable to provide sufficient specificity to establish materiality of documents requested because the documents themselves were not available to him, the *Poindexter I* court conducted an *in camera* examination of the former President's diaries, notes, and notebooks to determine whether they contained relevant evidence which should be produced.[3] *Id.* at 1510.

---

[3] *In camera* inspection of documents to determine relevance and admissibility in a criminal prosecution *after* assertion of presidential privilege and presentation of sufficient evidence to rebut the presumption of privilege which attends such an assertion was approved by the U.S. Supreme Court in *United States* v. *Nixon*,

The equivalent of this process has already occurred in this case, as demonstrated by the Court's July 11, 2002 Order and its evaluation of plaintiff's proposed discovery plan. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Aug. 8, 2002) (Order approving plaintiffs' proposed discovery plan and setting forth discovery procedures); Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32. In other words, this Court has already done essentially what the *Poindexter* court did: it has determined what precise discovery is both material and necessary to resolve the threshold issues presented in this case and subsequently approved it.

Where, as here, "other than their interpretation" of cases, and citation to cases the court has found to be inapposite, defendants "have offered little to support their desired result and they have not persuaded the Court that conflicting authority exists on the issue presented" as applied to the relevant facts, interlocutory appeal pursuant to § 1292(b) has been held to be unwarranted. *See First Am. Corp* v. *Al-Nahyan*, 948 F. Supp. at 1117. Furthermore, "neither unusual facts nor legal issues of first impression require, or in this

418 U.S. at 713-14. This Circuit has approved *in camera* inspection of documents to determine the propriety of a President's assertions of executive privilege *after* they were made, as well as the relevance of the materials to grand jury proceedings. *Nixon* v. *Sirica*, 487 F.2d 700, 718-721 (D.C. Cir. 1973). This Court has repeatedly offered defendants the option of offering responsive documents to the Court for *in camera* review, *prior* to assertion of any privilege with respect to the documents, thereby offering defendants exactly the same procedure followed by the *Poindexter II* court. Defendants have not accepted this proposal by the Court.

instance justify, certification of an interlocutory appeal." *Id.*

Moreover, in their motion for certification, defendants persist in conflating within the term "discovery" the notion of requiring production of documents and the far less drastic result of this Court's Orders, which simply require that defendants produce non-privileged documents and make particularized assertions of privilege where appropriate. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 31519674 at *3 (D.D.C. Nov. 13, 2002); *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Oct. 17, 2002) (Order denying motion for protective order); *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Aug. 8, 2002) (Order approving plaintiffs' proposed discovery plan and setting forth discovery procedures). Compliance with the Court's Orders will not necessarily result in plaintiffs "obtaining" *any* discovery, as it is entirely conceivable that defendants could assert specific viable claims of privilege for every responsive document or category of documents. Only then would the question defendants seek to certify for interlocutory appeal, whether discovery should be provided to plaintiffs without demonstrating "any need" for the documents requested, be ripe for judicial review.

This Court has already answered that question in the affirmative, in a manner consistent with existing authority, which establishes that the appropriate stage at which to require a party seeking discovery to demonstrate "need" arises only after the opposing party has asserted a privilege, even where that party is a member of the Executive Branch, up to and including the

President of the United States. *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *26, 27, *see also Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 31519674 at *3 (citing cases). Therefore, by mischaracterizing the intent and effect of this Court's Orders, defendants have created a legal question, for which they now seek certification, where none exists. Where "it is only against a mischaracterization of the Court's holdings that the plaintiff can identify substantial ground for a difference of opinion," a motion to certify under § 1292(b) is properly denied. *See Foster* v. *United States*, 926 F. Supp. 199, 203 (D.D.C. 1996).

Finally, this Court's discovery Orders would not require reversal if decided incorrectly, nor would such a finding materially alter the course of litigation. *See Johnson* v. *Burken*, 930 F.2d at 1206. The Eighth Circuit has held that "resolution of a discovery dispute does little to advance the ultimate termination of litigation and results only in delay." *White* v. *Nix*, 43 F.3d at 378-79 (reasoning that plaintiff would press his claim regardless of whether or not he obtained the files the court had ordered produced, potentially seeking to discover the same information through alternate means; "[w]hen litigation will be conducted in substantially the same manner regardless of our decision, the appeal cannot be said to materially advance the ultimate termination of the litigation."). None of the circumstances present in cases where interlocutory appeal has been justified on this ground exist here. *See, e.g.*, *Johnson* v. *Wash. Metro Area Trans. Auth.*, 773 F. Supp. at 461 (resolution of an "apparent intra-circuit split" might negate the need for a jury trial). Conversely, untimely interlocutory appeal of orders can

"prolong and substantially delay the litigation," causing all parties to incur greater expense, and thus do not "materially advance the litigation." *See In re Vitamins Antitrust Litigation*, 2000 WL 673936 at *3; *Brown* v. *Pro Football, Inc.*, 812 F. Supp. 237, 239 (D.D.C. 1992).

Defendants' contention that certification of this Court's Orders for interlocutory appeal will materially advance this litigation necessarily assumes that they will prevail on appeal. This result is far from certain. As noted by one District Judge, "[w]hile certainly the ultimate termination of this litigation would be advanced if the Court of Appeals heard and sustained defendant's defense at this time, the court is not of the opinion that this is a likely course of events. Therefore, the court will not invoke its discretionary authority to certify the issues decided in [its] Order to the Court of Appeals under section 1292(b)." *U.S. ex rel Hollander*, 420 F. Supp. at 859; *see Nix*, 43 F.3d at 378- 79.

Defendants also assume that a ruling in their favor on all three issues at the Circuit level will result in dismissal of the action as to them, or at least relieve them of the burden of participating in discovery. However, a number of substantive questions were left unresolved by this Court's July 11, 2002 Order which would require further litigation before this Court, with or without the benefit of discovery of non-agency defendants. *See* Tr. 11/13/02 Hr'g. at 33:23-24. In fact, a ruling favorable to the defendants on this issue could conceivably result in more arduous proceedings for all parties, as the Court and the parties struggle to find other ways of establishing whether or not the predicate facts for the application of FACA exist, and moving this litigation forward. Accordingly, defendants have not carried their burden of demonstrating that interlocutory appeal of

this question at this point in time would materially advance the litigation as a whole.

D. Availability of discovery in action pursuant to the APA or mandamus statutes

The third question defendants seek to certify for interlocutory appeal concerns the availability of discovery under the APA or the federal *mandamus* statute. Defendants contend that it is "well settled" that judicial review pursuant to the APA must be limited to the administrative record absent "exceptional circumstances," which only arise upon a "strong showing of bad faith or improper behavior" or "when the record is so bare that it prevents effective judicial review." Defs.' Mot. at 6, 8; Defs.' Reply at 6, citing *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). They further hypothesize, citing only to their own arguments in objection to the plaintiffs' proposed discovery plan, that the scope of discovery in a *mandamus* action should be no greater than that permitted under the APA. *See* Defs.' Mot. at 6, Defs.' Reply at 6.

The question of the scope of permissible discovery in a *mandamus* or APA action is not controlling, and its resolution will not materially advance this litigation. As plaintiff Sierra Club correctly points out, if this Court has reached an incorrect conclusion under either the *mandamus* statute or the APA with respect to the propriety of limited discovery this case, then the Court of Appeals is free, upon review of final judgment, to make its ruling on the APA record alone, or to remand to this Court for such a review of plaintiffs' claims. Additionally, as defendants have repeatedly stated, agency defendants, who are the only defendants against whom discovery was sought under the APA, have already provided plaintiffs with discovery, thereby rendering the question moot for purposes of interlocutory appeal. *See* Tr. 11/13/02 Hr'g. at 32:24 - 33:2.

Moreover, with respect to the proper scope of discovery in a *mandamus* action, defendants' citation to their own arguments, without more, is simply insufficient to create the requisite "substantial ground for difference of opinion" on this issue. A litigant cannot create a "substantial ground for difference of opinion" justifying interlocutory appeal simply by arguing for a particular interpretation or extension of existing law. Furthermore, as defendants themselves concede, what authority they do rely on with respect to this question actually suggests that, under certain circumstances, discovery is appropriate in a *mandamus* action. *See* Defs.' Objections to Plaintiffs' Proposed Discovery Plan at 9 n.6, citing *Conservation Law Foundation of New England, Inc.* v. *Clark*, 590 F. Supp. 1467, 1472-73 (D. Mass. 1984) ("Courts have indicated that independent fact finding under mandamus is appropriate in some circumstances even where agency action is under review."). Although discovery in a *mandamus* action may not be appropriate where the statute governing agency action provides significant discretion, or where relevant regulatory issues are particularly within the agency's competence and expertise, courts have found discovery to be appropriate where an agency has either completely abrogated its enforcement responsibilities or acted clearly outside the bounds of relevant statutes. *Id.* at 1473 (citing cases). None of these factors counseling either for or against discovery in a *mandamus* action are necessarily present in the current case. However, both the contemplated review of agency action and the "record" in this case are decidedly uncon-

ventional. This Court has identified compelling reasons in favor of allowing tightly reined discovery on threshold issues, which, in light of the absence of authority holding such discovery unavailable, it deems sufficient to justify the discovery contemplated by the Orders here challenged. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31, 32.

As for the proper scope of discovery in an APA action, this Court has impliedly held that this case does in fact present the type of "exceptional circumstances" in which discovery beyond the administrative record is required to assist the Court in adjudicating the questions before it. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *23 (stating that defendants' argument that no further factual development is required "flies in the face of the precedent that has developed separation of powers doctrine as a fact-intensive, case-by-case analysis of the specific nature of the intrusion into the President's performance of his constitutional duties."); Tr. 08/02/02 Hr'g. at 19:1 - 19:11. This Court has already concluded that, in light of the delicate balancing of constitutional concerns required of the Court in this case, more information than is contained in the scant administrative record currently available, which consists in its entirety of the President's memorandum to the Vice-President establishing the NEPDG, the NEPDG's final report, and the affidavit of the NEPDG's former Deputy Director, is necessary to resolve the question of whether and how FACA is applicable to the NEPDG. *See Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32.

This conclusion is not inconsistent with the precedent cited by defendants in support of their contention that,

as a general rule, no discovery beyond the administrative record should be permitted in an APA case. *See* Defs.' Mot. at 8, Defs.' Reply at 6. The facts of the case currently before this Court most certainly do not present circumstances analogous to those present in the APA cases cited by defendants, in which an agency's adjudicative or legislative processes were the subject of judicial review. *See, e.g., Camp* v. *Pitts*, 411 U.S. 138, 141-142, 93 S. Ct. 1241, 1243-44 (1973) (adjudicative process); *Marshall Co. Health Care* v. *Shalala*, 988 F.2d 1221, 1226-27 (D.C. Cir. 1993) (rulemaking); *see also Conservation Law Foundation of New England, Inc.*, 590 F. Supp. at 1474-75 (recognizing, in the context of rulemaking, a number of exceptions to the general rule that a court's inquiry in administrative review cases is "confined to the full record before the agency at the time the decision is made"); *see also* Tr. 08/02/02 Hr'g. at 13:16 - 14:25. Additionally, this Court has already concluded that the administrative record here is "so bare that it prevents effective judicial review." *See* Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at 31 ("it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum that established the NEPDG."); *see also Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Conservation Law Foundation of New England, Inc.*, 590 F. Supp. at 1474-75 (most exceptions to the rule confining APA review to the record before the agency "involve instances where the record submitted by the agency is self-serving, incomplete or unclear."). Therefore, this Court has found, consistent with controlling and persuasive precedent, that circumstances exist in this case

warranting limited discovery into matters outside the scant administrative record.

In light of the foregoing, it is clear that defendants have failed to carry their burden of establishing the existence of a "controlling question of law" as to which there is a "substantial ground for difference of opinion" with respect to the permissible scope of discovery under the federal *mandamus* statute or the APA. At most, they have argued for a different application of the law to the facts before the Court, and specifically for application of the general rule rather than the permissible exception. Defendants can advance such arguments on appeal after final judgment, but they have not established the basis for doing so at this time under § 1292(b).

With respect to all three questions for which they seek certification, defendants have not met their burden of establishing that exceptional circumstances justifying interlocutory appeal exist under the standard set forth by § 1292(b). Defendants have, throughout this litigation, zealously advocated in favor of, at best, a different interpretation, and at most, a dramatic extension of existing precedent with respect to each of the three legal questions they seek to certify. However, defendants' conviction of the correctness of their position is insufficient to carry them over the high threshold posed by the standard governing certification for interlocutory appeal. Defendants have simply failed to establish the factual and legal predicates justifying interlocutory review pursuant to § 1292(b).

Accordingly, it is by the Court hereby

ORDERED that defendants' motion for certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is hereby **DENIED.**

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
November 26, 2002

Notice to:
Larry Klayman, Esq.
Paul J. Orfanedes, Esq.
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, DC 20024
Counsel for plaintiff Judicial Watch

Roger M. Adelman, Esq.
1100 Connecticut Avenue, N.W.
Suite 730
Washington, DC 20036
Counsel for plaintiff Sierra Club

David G. Bookbinder, Esq.
408 C Street, NE
Washington, DC 20002
Counsel for plaintiff Sierra Club

Patrick Gallagher, Esq.
Alex Levinson, Esq.
Sierra Club
85 Second Street
San Francisco, CA 94104
Counsel for plaintiff Sierra Club

Daniel Edward Bensing, Esq.
David O. Buchholz, Esq.
Anne L. Weismann, Esq.
Thomas Millet, Esq.
Jennifer Paisner, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Counsel for federal defendants

Howard M. Crystal, Esq.
MEYER & GLITZENSTEIN
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
Counsel for amicus NRDC

Robert S. Litt, Esq.
ARNOLD & PORTER
555 12th St NW
Washington, DC 20004-1206
Counsel for defendant Thomas Kuhn

Paul Christian Rauser, Esq.
WILLIAMS & CONNOLLY
725 12th Street, NW
Washington, DC 20005
Counsel for defendant Haley Barbour

Richard D. Horn, Esq.
BRACEWELL & PATTERSON LLP
2000 K St NW
Suite 500
Washington, DC 20006-1872
Counsel for defendant Mark Racicot

No. 02-5354
(Consolidated with Nos. 02-5355, 02-5356)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES,
ET AL. PETITIONERS

On Appeal And Petition For A Writ Of Mandamus
From The United States District Court For
The District Of Columbia

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
DAVID B. SALMONS
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
ERIC D. MILLER
(202) 514-5089
Attorneys
U.S. Department of Justice
601 D Street, N.W., Room 9108
Washington, D.C. 20530-0001

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

This case presents separation-of-powers questions of exceptional importance arising from the district court's orders compelling the Vice President and other close presidential advisors to comply with broad discovery requests by private parties seeking information about the process by which the President received advice on important national policy matters from his closest advisors. The panel majority's opinion, which holds that the district court's unprecedented discovery orders are insulated from interlocutory review, exacerbates the "serious constitutional problem[s]" inherent in the Federal Advisory Committee Act (FACA), 5 U.S.C. App. §§ 1 *et seq.*, especially as construed by this Court in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*). Slip op. 1 (Randolph, J., dissenting). As Judge Randolph explained in his dissent: "As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality. The decision in this case pushes it over." *Ibid.* (citing Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994)).

In particular, the majority's holding that this Court lacks jurisdiction because the President has yet to assert executive privilege over any of the information sought in discovery misunderstands both this Court's cases governing mandamus and appellate jurisdiction and the nature of petitioners' separation-of-powers arguments, which do not turn on claims of privilege, but rather on the inappropriateness of ordering any discovery against the President's closest advisors based

on unsupported assertions in a complaint that they disobeyed a clear directive by the President in the formation of an advisory committee. Moreover, by permitting broad-ranging discovery based on such bare allegations of wrongdoing, the decisions of the district court and the panel conflict with precedents of this Court and the Supreme Court limiting discovery in Administrative Procedure Act (APA) and mandamus actions and affording a presumption of regularity to executive action. While both the Supreme Court and this Court have interpreted the FACA to avoid constitutional problems, the decisions by the panel and the district court will routinely generate the kind of intrusions the courts have sought to avoid. En banc review by this Court is warranted to resolve those conflicts and to ensure that the FACA does not intrude on the President's vital interests in receiving unregulated and uninhibited advice from his closest advisors or on the unique relationship between the Presidency and the Vice Presidency.

STATEMENT OF FACTS

1. President Bush established the National Energy Policy Development Group (NEPDG) as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. *See* App. 117. The President named the Vice President to preside over meetings and direct the work of the NEPDG and designated a number of other senior federal officials to constitute the NEPDG. App. 117-18. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." App. 118.

It was directed to "gather information, deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.* On May 16, 2001, the NEPDG issued a public report containing a set of recommendations to enhance energy supplies and encourage conservation. *See NEPDG Report* (available at *www.whitehouse.gov/energy/National-Energy-Policy.pdf*). The report included a list of the members of the NEPDG. In accordance with the President's January 2001 memorandum, App. 117, all of the members identified in the report were "officers of the Federal Government." The NEPDG was terminated on September 30, 2001. App. 119, 257-58.

2. Plaintiffs Judicial Watch, Inc. and Sierra Club filed these consolidated actions against Vice President Cheney, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG was a FACA advisory committee. Plaintiffs requested access to NEPDG documents and a declaration that the defendants violated the FACA. App. 48, 113-15. The government filed motions to dismiss, which the district court granted in part and denied in part. The court held that the FACA itself provides no private right of action, but that the statute is enforceable through either the APA or mandamus. The court recognized that the Vice President is not an "agency" within the meaning of the APA, App. 148-49, but, without deciding the question, left open the prospect that the Vice President could be sued through mandamus, App. 169. It also deferred ruling on the government's contention that applying the FACA to the NEPDG would violate the separation of powers and interfere with core Article II prerogatives, on the ground that discovery could obviate the need to resolve that constitutional question. App. 170-94. The

court acknowledged "the seriousness of the constitutional challenge raised by defendants," App. 171, and it recognized that allowing discovery could present related constitutional questions, App. 193.

The court nevertheless directed plaintiffs to submit a proposed discovery plan, which it approved on August 2, 2002, directing the government to "fully comply with" plaintiffs' discovery requests or "file detailed and precise objections to particular requests." App. 238-39. Among other things, the district court approved the plaintiff's request for the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and outside individuals. *See, e.g.*, App. 246, 251, 253.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established APA procedure. In addition, the government submitted an affidavit of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." App. 257, 260-62. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees, as were the staff assembled to assist the NEPDG and draft the report. *See* App. 261-62. The district court denied the government's motion for a protective order, App. 313, and declined to allow the government to file a motion for summary judgment, App. 264.

ARGUMENT

I. THIS COURT HAS BOTH MANDAMUS AND APPELLATE JURISDICTION

The panel majority held that it lacked jurisdiction to issue a writ of mandamus because the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President "can be fully addressed, untethered by anything we have said here, on appeal following final judgment." Slip op. 16. The majority based this conclusion on the fact that the petitioners have not yet asserted document-specific privileges and on its assumption that more targeted discovery than the district court had required might establish that the NEPDG is not a FACA committee, thereby obviating the need to address petitioners' constitutional arguments. *Id.* at 8-19. For similar reasons, the majority dismissed the Vice President's appeal for lack of jurisdiction. *Id.* at 20.

This Court, however, has both mandamus and appellate jurisdiction to review the district court's unprecedented and unconstitutional discovery orders. By holding that petitioners have no means of challenging those discovery orders on interlocutory review and that they must endure an ongoing separation-of-powers injury, the panel majority has significantly exacerbated the constitutional problems inherent in the FACA and *AAPS*. Under the district court's and the majority's opinions, there is nothing the President or his advisors can do to avoid broad discovery by private parties based on the barest of allegations anytime the President seeks advice from a formal group of his closest advisors. Given the important separation-of-powers problems presented by the discovery permitted by the

majority, its jurisdictional errors warrant en banc review.

1. Contrary to the majority's holding (slip op. 11, 13), the fact that petitioners have not yet asserted privilege over the documents subject to the district court's discovery orders does not render the separation-of-powers problems associated with those orders either "premature" or "hypothetical." Nor can those problems be adequately addressed by the district court on remand or by appeal after final judgment. The separation-of-powers arguments raised in the petition for mandamus are not premised upon claims of privilege over particular documents or categories of documents. Rather, petitioners claim that the Vice President and other close Presidential advisors may not be forced through civil discovery to review the process by which they advised the President and assert executive privilege over certain communications in response to mere unsupported allegations that the membership of the President's advisory committee was materially different from that directed by the President and stated in the committee's report. The district court's open-ended discovery orders, even as limited by the panel majority, are aimed at exposing details of the process by which a President obtains information and advice from the Vice President and other close advisors and raise separation-of-powers concerns of the first order, whether or not the information is privileged.

The majority (slip op. 12) mistakenly reads *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000), to establish that mandamus review of discovery orders is always unavailable "absent a viable claim that some important privilege will be infringed if discovery is allowed to proceed." The Court in that case, however, merely held that, if executive branch officials seek mandamus on the ground that a discovery order will result in the disclosure of privileged information, they must show that the information is privileged. The Court rejected mandamus because the officials "present[ed] no substantive argument whatsoever" in support of their privilege claims. *Id.* at 24. The Court neither held that a claim of privilege was a necessary prerequisite to mandamus review, nor purported to set out a general rule. Indeed, it emphasized that "[t]here are occasions when mandamus relief may be appropriate to challenge a District Court's discovery order," *id.* at 23, and it gave as an example *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998), which granted mandamus to review an assertion of diplomatic immunity from any discovery whatsoever.

The panel majority, however, sidestepped both *In re Papandreou* and *In re Sealed Case*, 151 F.3d 1059 (D.C. Cir. 1998). In the latter, the Court granted the Independent Counsel's mandamus petition where the district court's disclosure orders were insufficiently protective of grand jury information. Most notably for purposes of this case, the Court rejected the assertion that the Independent Counsel "would not be irreparably harmed by the orders because the orders allowed him to redact any Rule 6(e) material and thus he would not be required to provide any confidential investigative material to the movants." *Id.* at 1062. The Court held "that the disobedience and contempt route to appeal cannot be labeled an adequate means of relief for a party-litigant." *Id.* at 1065. The Court further explained that the Independent Counsel "is not troubled solely by the possibility that Rule 6(e) material might be disclosed, but also by the prospect of disclosing even

the identities of members of the press with whom the IC and his staff have spoken." *Id.* at 1066. Likewise, a limitation on disclosure alone would not "assuage petitioner's fear that discovery and an adversarial hearing will divert petitioner's focus." *Ibid.*

Both *In re Papandreou* and *In re Sealed Case* support mandamus jurisdiction here, and the panel's decision holding mandamus categorically unavailable conflicts with those decisions in a manner that justifies en banc review. First, just as in *In re Papandreou*, petitioners' separation-of-powers objections to the district court's discovery orders are separate and antecedent to any claims of privilege. Accordingly, the potential availability of those privilege claims does not limit this Court's jurisdiction. The majority itself recognized that petitioner's separation-of-powers arguments are both broader than and antecedent to any specific future claims of privilege, *see* slip op. 13 (characterizing petitioner's separation-of-powers argument as more like an "immunity" than a privilege), but then failed to recognize the jurisdictional consequence of that observation. As the Court in *In re Papandreou* explained: An "immunity claim has special characteristics beyond those of ordinary privilege. The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough." 139 F.3d at 251. So too here. The kind of discovery ordered violates the separation of powers without regard to whether privilege could or would be asserted. That is made clear in the Supreme Court's decision in *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440 (1989), in this Court's decision in

AAPS, and in Judge Gesell's decision in *Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975). In each case, the court acknowledged the serious separation-of-powers concerns raised by the FACA, even though no privilege claim had been asserted. *See, e.g., Nader*, 396 F. Supp. at 1234 & n.5 (concern that President had not asserted privilege "misses the point").

Likewise, as in *In re Sealed Case*, 151 F.3d at 1066, the separation-of-powers problems go well beyond the confidentiality concerns addressed by privilege, and discovery has the potential to "divert [the] * * * focus" of the President and his closest advisors. By requiring the President to make "document by document" and "line by line" assertions of privilege over the myriad of documents covered by the discovery orders, the majority's approach ensures that "the President will be distracted and diverted from the performance of his constitutional duties and responsibilities." Slip. op. 8 (Randolph, J., dissenting).

Accordingly, the potential assertion of privilege does not eliminate the separation-of-powers problems of ordering discovery to probe the process by which the Vice President and other close advisors gathered information to advise the President. Petitioners cannot obtain meaningful review of their claims after discovery has concluded, because the very essence of their claims is that any discovery in the context of the record in this case would violate the separation of powers.

2. For similar reasons, the majority's denial of jurisdiction over the Vice President's appeal and its attempt to distinguish *United States* v. *Nixon*, 418 U.S. 683 (1974), are also mistaken. The majority's reading of *Nixon* as requiring the assertion of a privilege claim before an appeal may be permitted (slip op. 15-16) is

illogical. Where, as here, the separation-of-powers arguments do not take the form of—and are logically antecedent to—a privilege claim, it serves no purpose to require the President or Vice President to assert privilege claims before permitting an interlocutory appeal.

In any event, *Nixon* did not turn on the assertion of privilege, but on separation-of-powers concerns raised by forcing the President to submit to contempt proceedings merely to facilitate timely review. The Court held that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate" in a case involving the President. 418 U.S. at 691. "To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." *Id.* at 691-92. Moreover, the Court held, "a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review." *Id.* at 692. Those same considerations support permitting an appeal here by the Vice President (or, at a minimum, providing appellate review on the merits of constitutional objections raised by the Vice President). *Cf. In re Papandreou*, 139 F.3d at 250 (citing *Nixon* and stating that "[m]andamus has been recognized as an appropriate shortcut when holding a litigant in contempt would be problematic").

The majority did not question that the unique role of the Vice President under the Constitution places him within the *Nixon* exception to the contempt requirement. Nevertheless, under the majority's approach,

the only way that the Vice President can obtain appellate review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery on remand and appeal an order holding him in contempt.

II. SEPARATION-OF-POWERS PRINCIPLES PRECLUDE DISCOVERY INTO THE ADVISORY ACTIVITIES OF THE VICE PRESIDENT AND OTHER PRESIDENTIAL ADVISORS BASED ON UNSUPPORTED ALLEGATIONS THAT NON-GOVERNMENTAL MEMBERS PARTICIPATED IN THOSE ACTIVITIES

By permitting broad discovery based solely on unsupported allegations of misconduct by federal officials in organizing an advisory group, and by rejecting any avenue for interlocutory review of such intrusive and improper discovery, the panel majority has generated the very type of unconstitutional intrusion into Executive Branch decisionmaking that cases such as *Public Citizen* and *AAPS* have sought to avoid in construing the FACA. As interpreted by the district court and the panel majority, there is little doubt that the FACA would violate the separation of powers, at least as applied to the Vice President and other close presidential advisors.

A. As Construed By The District Court And The Panel Majority, The "De Facto" Member Doctrine Adopted In *AAPS* Renders The FACA Unconstitutional

Both the district court (*see* App. 190-194) and the panel majority (*see* slip op. 10-11, 16-18) relied heavily on the part of *AAPS* that remanded a FACA case for expedited discovery. *See* 997 F.2d at 901, 915-16. The

AAPS Court stated that, in the context of that case, it would look beyond formal membership to determine whether persons formally designated as "consultants" to task force working groups "may still be properly described as * * * member[s] of an advisory committee if [their] involvement and role are functionally indistinguishable from those of the other members." *Id.* at 915.

AAPS, however, does not support discovery *in this case*, and the majority's opinion, although purporting to be bound by *AAPS*, represents a significant—and constitutionally problematic—extension of *AAPS*'s de facto member doctrine that puts the FACA on a collision course with the Constitution. First, *AAPS* did not consider the source of a cause of action to enforce the FACA, which this Court only later indicated is the APA, *Claybrook* v. *Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997). Accordingly, the *AAPS* Court had no occasion to consider the scope of discovery properly available in an APA (or mandamus) action alleging a FACA violation. The parties did not ask the Court to confront the issue. Nothing in *AAPS* therefore should be read as authorizing broad discovery in an APA or mandamus action based on a mere allegation of de facto members.[1]

Second, *AAPS*'s discussion of "de facto" members should not be transplanted beyond the unique facts of that case. Most notably, in *AAPS*, the government's

[1] Indeed, the Court in *AAPS* arguably rejected such an approach by noting that "the government has a good deal of control over whether a group constitutes a FACA advisory committee," and, "for that reason, it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch." 997 F.2d at 914.

own submissions raised genuine questions as to whether the working group at issue was, in fact, composed of government officers and employees, *see* 997 F.2d at 914-15, and whether the group lacked the formality and structure of an advisory committee, *id.* at 914. No comparable questions have been raised here. To the contrary, the President's order establishing the NEPDG unambiguously requires that only government officials be permitted to act as members, and the NEPDG's published report confirms that the President's command was followed.[2]

Despite these differences, the panel majority viewed itself as bound by *AAPS*. But by extending *AAPS* to the very different procedural and factual context at issue here, the panel's reading of *AAPS*, "pushes it over" the constitutional edge. Slip op. 1 (Randolph, J., dissenting). As Judge Randolph explained, the de facto membership doctrine has no support in the FACA's text, conflicts with the relevant GSA regulation, 41 C.F.R. § 101-6.1003 (2000), and as construed by the district court and the panel majority, inevitably leads to constitutionally problematic discovery.

[2] Two other features of *AAPS* are noteworthy. The Court in *AAPS* did not provide for proceedings on remand on any question concerning the President or Vice President or the membership of the task force itself, once the *legal* status of the First Lady's conceded role was resolved; rather, only subsidiary matters concerning staff-level participation by outsiders in actual deliberations was involved. And, although the Court's decision referred to expedited discovery, it would have been open to the government to argue on remand that, at least in the first instance, the factual questions should have been resolved by further government submissions.

In the context of this case in particular, the majority's construction of the doctrine threatens to cripple the President's ability to employ groups of high-level government officials as a means of obtaining advice. The district court subjected petitioners to discovery at least as broad and constitutionally problematic as the disclosure requirements of the FACA itself in order to determine whether there were unauthorized de facto members of the NEPDG. It did so, moreover, based solely on an unsupported allegation in a complaint that is contradicted by the President's order creating the NEPDG, by the NEPDG's published report, and by a declaration by a top NEPDG staff person, all of which confirm that there were no non-governmental NEPDG members—de facto or otherwise. Any construction of *AAPS* or the FACA that would permit discovery in such circumstances would violate fundamental principles of the separation of powers. Indeed, in important respects, the constitutional intrusion here is even more significant than that at issue in *Public Citizen* or *AAPS*. Those cases threatened to restrict the President's means of obtaining advice from private persons. The majority's position would restrict not only legitimate contacts with private persons, but would cause the President to hesitate before creating any formal working group consisting wholly of heads of executive departments. Accordingly, if the majority's characterization of *AAPS* is accepted, then petitioners request that the en banc Court either limit *AAPS* to its specific context or revisit the issue and reject the de facto member doctrine.[3]

[3] The majority mistakenly states that petitioners did not argue below or before the panel that *AAPS* should be overturned or that the district court's construction of the FACA is unconstitutional. Slip op. 17. *But see id.* at 9 n.5 (Randolph, J., dissenting) ("[T]he federal officers have repeatedly argued before the district court and this court that the discovery, as permitted by *AAPS*, violates the separation of powers. *See, e.g.*, Emergency Pet. for Writ of Mandamus at 14-15; *Judicial Watch, Inc.* v. *Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 46 (D.D.C. 2002). The problem here is not that the petitioners failed to make the arguments. The problem is that the majority failed to answer them."). In fact, petitioners argued below that *Public Citizen*, rather than *AAPS*, is the appropriate constitutional standard, and that *AAPS* was wrongly decided. *See, e.g.*, 3/8/02 Mem. in Support of Mot. to Dismiss at 18-23. In any event, it is to the en banc Court, not the district court or the panel, that a frontal challenge to *AAPS* should be directed. That is particularly true here, given that the panel heard argument based only on the mandamus petition itself, and petitioners have yet to be afforded an opportunity to brief this case fully before this Court. For that reason, should the Court grant rehearing, petitioners respectfully suggest that the court would benefit from a full round of briefing before the en banc Court.

B. Discovery Would Violate Longstanding Principles That Generally Preclude Discovery Into The Internal Workings Of The Executive Branch And That Afford Executive Branch Actions A Presumption Of Regularity

1. The Vice President has respectfully but resolutely maintained that, in the circumstances of this case, the legislative and judicial powers cannot extend to compelling a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President, heads of departments and agencies, and assistants to the President in the President's exercise of powers committed exclusively to the President by the Recommendations and Opinions Clauses. In particular, the Vice

President has argued that any application of FACA to hinder the Vice President's assistance of the President in discharging his core Article II responsibilities would violate the separation of powers. The district court recognized the seriousness of those concerns and then ordered sweeping discovery raising equally serious separation-of-powers problems. Those difficulties could have been avoided, however, if the district court had appreciated the significance of its determination that FACA does not provide a cause of action and so this lawsuit could proceed, if at all, only as an APA or mandamus action.[4] The APA makes clear that judicial review is generally based on an administrative record, not discovery. *See, e.g., Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971). Thus, even in cases presenting significant allegations of agency misconduct, this Court has remanded the matter to the agency rather than allow discovery. *See Professional Air Traffic Controllers Org. (PATCO)* v. *FLRA*, 672 F.2d 109, 113 (D.C. Cir. 1982).

The panel majority, however, stated that discovery might be proper in this case under an exception to the

[4] Judge Randolph concludes (slip op. 1 n.1) that the APA "does not apply" because "[t]he alleged FACA 'advisory committee' here was not an 'agency' within the meaning of the APA Petitioners agree and so argued below. *See* 3/8/02 Mem. in Support of Mot. to Dismiss at 13. Accordingly, plaintiffs could sue, if at all, only under mandamus. Slip op. 1 n.1 (Randolph, J., dissenting). Petitioners have argued in the alternative that even if this case can proceed under the APA, as the district court held, discovery here was improper because the administrative "record" makes clear that the FACA does not apply. In any event, the discovery available under mandamus can be no more intrusive than that authorized under the APA.

APA's rule against discovery for cases in which the record is so bare that it prevents effective judicial review. Slip op. 10. The majority suggested that the record of the NEPDG's activities was not a traditional administrative record and that while the President's memorandum establishing the NEPDG and the NEPDG's report "tell us * * * that the NEPDG's members were all federal employees," they "reveal nothing about whether, notwithstanding the President's appointment of only federal officials, non-federal personnel participated in the work of the NEPDG 'as if they were members.'" *Ibid.* (quoting Judicial Watch Am. Compl. ¶ 25).

But as Judge Randolph's dissent points out (slip op. 6-7), the issue is not whether the record of the NEPDG —which after all, was not an "agency" within the meaning of the APA—complied with the precise record-keeping requirements of the APA. Rather, the only question is whether Congress, in enacting the FACA, intended to permit discovery based on unsupported statements of the kind on which plaintiffs rely. There is no indication in the FACA, which does not expressly provide for judicial enforcement, that Congress wished to sanction this type of intrusion. The FACA does not create any requirements for creating a record documenting membership and by its terms imposes no requirements on committees made up exclusively of government employees. By omitting any express right of private enforcement and imposing no record-keeping requirement for membership questions, Congress at most intended that the statute be enforced only as consistent with the APA and its assumption that records concerning membership will often be relatively bare.

Under the APA, as *Overton Park* explains, courts generally may not order discovery. 401 U.S. at 419. To be sure, *Overton Park* allows discovery to fill in a "gap" in the administrative record. But a gap exists only where the record taken as a whole would not permit review of the agency action under Section 706, and here, there is no "gap." Both the President's memorandum establishing the NEPDG and the NEPDG's report speak clearly to the issue of the group's membership, and both confirm that its only members were federal officials. The alleged "gap" stems only from plaintiffs' unsupported allegation that somewhere there is a document that shows that the President was disobeyed and private individuals were somehow permitted to serve as NEPDG members. Such baseless allegations, however, could always be made to suggest a "gap" in any administrative record. Nothing in *Overton Park* suggests discovery would be appropriate based on such allegations.[5]

2. In addition, both the district court's discovery orders and the majority's opinion suggest that the plaintiffs' claims could not be adjudicated on the basis of the administrative record or supplemental declarations filed by the government because of what those courts chose to accept as an ever-present *possibility* of irregularities (unsupported by any specific evidence in this case). That approach reverses the normal presumption

[5] Nor is there any reason to believe that Congress wished to allow a plaintiff to circumvent APA limitations by seeking a writ of mandamus against the Vice President. Indeed, even where mandamus review is available, it is also generally limited to an administrative record, *see Texas Rural Legal Aid, Inc.* v. *Legal Serv. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991).

of regularity accorded to government action. *See United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001); *American Fed. of Gov't Employees, AFL-CIO* v. *Reagan*, 870 F.2d 723, 727-28 (D.C. Cir. 1989). It is that presumption, not a generalized speculation that "the government doesn't always comply with the law," App. 217, that governs extra-record discovery into even routine agency action. As the Supreme Court and this Court have explained, "*in the absence of clear evidence to the contrary*, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926) (emphasis added); *Morris* v. *Sullivan*, 897 F.2d 553, 560 (D.C. Cir. 1990) (same). And that presumption, in turn, ordinarily precludes discovery into the inner workings of the Executive Branch. *See United States* v. *Armstrong*, 517 U.S. 456, 463-65, 468-70 (1996).

Absent a compelling showing of need by a party seeking discovery from the Vice President and the President's other immediate advisors, a court should not even consider whether such discovery may constitutionally be ordered in a particular case. *See United States* v. *Poindexter*, 727 F. Supp. 1501, 1504-06 (D.D.C. 1989); *Dellums* v. *Powell*, 561 F.2d 242, 245-49 (D.C. Cir. 1977). Plaintiffs have made no effort to make any such showing of need in this case. Indeed, as this Court has made clear, principles of comity require strict limitations on discovery from *all* high-ranking executive branch officials. *See Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)); *In re Papandreou*, 139 F.3d at 253-54. Here, the President assigned the Vice President and the other members of the NEPDG to fulfill core executive branch functions under Article II of the Constitution. In this

context, especially, the Constitution and principles of comity preclude discovery of the President or Vice President.

By allowing discovery to proceed on the strength of bare allegations of wrongdoing, the decision below and the panel decision conflict with precedents of this Court and the Supreme Court limiting discovery in APA and mandamus actions, affording a presumption of regularity to executive action, and prohibiting discovery against high-ranking officials absent a showing of need. This Court should grant en banc review to address these conflicts and to address the serious separation-of-powers concerns raised by a coordinate branch, and by the Vice President himself.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing, or in the alternative, rehearing en banc.

Respectfully Submitted,

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
DAVID B. SALMONS
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
ERIC D. MILLER

(202) 514-5089
Attorneys
U.S. Department of Justice
601 D Street, N.W., Room 9108
Washington, D.C. 20530-0001

ADDENDUM

CERTIFICATE AS TO PARTIES, AMICI, AND RELATED CASES

Pursuant to Circuit Rules 35(c) and 28(a)(1)(A), the petitioners/appellants submit the following certification:

The respondents-appellees are Judicial Watch, Inc. and the Sierra Club. Petitioners- appellants are: Richard B. Cheney, Vice President of the United States; the National Energy Policy Development Group; John W. Snow, Secretary of the Treasury; Gale A. Norton, Secretary of the Interior; Ann M. Veneman, Secretary of Agriculture; Donald L. Evans, Secretary of Commerce; Norman Y. Mineta, Secretary of Transportation; Spencer Abraham, Secretary of Energy; Colin L. Powell, Secretary of State; Joseph L. Allbaugh, Director, Federal Emergency Management Agency; Marianne L. Horinko, Acting Administrator, Environmental Protection Agency; Patrick H. Wood, III, Chairman, Federal Energy Regulatory Commission; Joshua B. Bolton, Director, Office of Management and Budget; Joshua Bolton, Assistant to the President and Deputy Chief of Staff for Policy; Stephen Friedman, Assistant to the President for Economic Policy; Andrew Lundquist, Executive Director, National Energy Policy Development Group; John D. Ashcroft, U.S. Attorney General.

In the district court, the following individuals were also named as defendants, but were dismissed from the case prior to the petition/appeal: Mark Racicot, Republican National Committee; Haley Barbour; and Thomas Kuhn. A further individual, Kenneth Lay, was named as a defendant in the Complaint but did not appear. The following individuals were named as

defendants in their official capacities and have subsequently been succeeded in office by the individuals identified above: Paul O'Neill, Secretary of the Treasury; Christine Todd Whitman, Administrator, Environmental Protection Agency; Mitchell E. Daniels, Jr., Director, Office of Management and Budget; Larry Lindsey, Assistant to the President for Economic Policy

The National Resources Defense Council appeared as amicus curiae in the district court.

This case has not previously been before this Court and counsel is not aware of any related case currently pending in this court or any other court.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August 2003, I am causing two copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc to be served on the following by Federal Express, next business day delivery:

Honorable Emmet G. Sullivan
United States District Court
for the District of Columbia
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Larry Klayman, Esq.
Paul Orfanedes, Esq.
Judicial Watch, Inc.
501 School Street, S.W., Suite 725
Washington, D.C. 20024

David Bookbinder, Esq.
Sierra Club
408 C Street, N.E.
Washington, D.C. 20002

Roger Adelman
Law Offices of Roger Adelman
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Ave., N.W. Suite 700
Washington, D.C. 20009-1035
Patrick Gallagher
Alex Levinson
Sanjay Narayan
Sierra Club
85 Second Street
San Francisco, California 94104

Douglas Hallward-Driemeier

GLOSSARY

AAPS	*Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993)
APA	Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*
App.	Appendix
FACA	Federal Advisory Committee Act, 5 U.S.C. App. §§ 1 *et seq.*
GSA	General Services Administration Energy Policy Development Group
slip. op.	*In re Richard B. Cheney, Vice President of the United States, et al.*, No. 02-5354 (D.C. Cir. July 8, 2003)

TABLE OF CONTENTS

	Page
GLOSSARY	1
CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE	2
STATEMENT OF FACTS	4
ARGUMENT	4
I. THIS COURT HAS BOTH MANDAMUS AND APPELLATE JURISDICTION	4
II. SEPARATION-OF-POWERS PRINCIPLES PRECLUDE DISCOVERY INTO THE ADVISORY ACTIVITIES OF THE VICE PRESIDENT AND OTHER PRESIDENTIAL ADVISORS BASED ON UNSUPPORTED ALLEGATIONS THAT NON-GOVERNMENTAL MEMBERS PARTICIPATED IN THOSE ACTIVITIES	8
A. As Construed By The District Court And The Panel Majority, The "DeFacto" Member Doctrine Adopted In *AAPS* Renders The FACA Unconstitutional	9
B. Discovery Would Violate Longstanding Principles That Generally Preclude Discovery Into The Internal Workings Of The Executive Branch And That Afford Executive Branch Actions A Presumption Of Regularity	12
CONCLUSION	15
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	**Page**
American Fed. of Gov't Employees, AFL-CIO v. *Reagan*, 870 F.2d 723 (D.C. Cir. 1989)	15
**Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993)	1, 9, 10
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	13, 14
Claybrooke v. *Slater*, 111 F.3d 904 (D.C. Cir. (1997)	10
Dellums v. *Powell*, 561 F.2d 242 (D.C. Cir. 1977)	15
* *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000)	5
Judicial Watch, Inc. v. *Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20 (D.D.C. 2002)	12
Morris v. *Sullivan*, 897 F.2d 553 (D.C. Cir. 1990)	15
**Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975)	7
In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998)	6, 7, 8, 15
Professional Air Traffic Controllers Orgs. (PATCO) v. *FLRA*, 672 F.2d 109 (D.C. Cir. 1982)	13
* *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989)	7
* *In re Sealed Cases*, 151 F.3d 1059 (D.C. Cir. 1998)	6, 7
Simplex Time Recorder Co. v. *Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985)	15

Texas Rural Legal Aid,, Inc. v. *Legal Serv. Corp.*, 940 F.2d 685 (D.C. Cir. 1991) 14
United States Postal Serv. v. *Gregory*, 534 U.S. 1 (2001) 15
United States v. *Armstrong*, 517 U.S. 456 (1996) 15
United States v. *Chemical Found.*, 272 U.S. 1 (1926) 15
* *United States* v. *Nixon*, 418 U.S. 683 (1974) 8
United States v. *Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989) 15

Statutes:

Federal Advisory Committee Act (FACA): 5 U.S.C. App. §§ 1 *et seq.* 1

Regulations:

41 C.F.R. § 101-6.1003 (2000) 11

Miscellaneous:

Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994) 1
NEPDG Report, www.whitehouse.gov/energy/National-Energy-Policy.pdf 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5354

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, PETITIONERS

RESPONSE TO PETITION FOR REHEARING AND TO SUGGESTION FOR REHEARING EN BANC

I. INTRODUCTION AND STATEMENT OF ISSUES

The panel majority correctly refused to issue a writ of mandamus, recognizing that Petitioners have failed to "identify some 'harm' flowing from the district court's challenged orders that cannot be remedied either in the district court or on appeal following final judgment." *In re Cheney*, 334 F.3d 1096, 1104 (D.C. Cir. 2003). Petitioners request a rehearing to answer "separation-of-powers questions" that this case does not, and may never, present: whether the Constitution forbids *disclosure* of the process by which the *National Energy Policy Development Group* advised the *President*. Petition for Rehearing & Suggestion for Rehearing En Banc ("Pet.") 1. That "question[]" is mistaken in each of its three premises. *Id.*

First, the District Court will not necessarily have to determine whether the *National Energy Policy Development Group* (the "Task Force") was an advisory committee governed by the Federal Advisory Committee Act, 5 U.S.C. App. 2 (2003) ("FACA"). The complaints allege as well that energy industry representa-

tives were members of lower-level "sub-groups" that assisted the Task Force. Sierra Club's Complaint for Declaratory & Injunctive Relief ("Complaint") ¶¶ 18-24 (App. 108-110); Declaration of Karen Knutson ("Knutson Decl.") ¶ 13 (App. 261-62); App. 118 (memorandum authorizing formation of sub-groups). Depending upon the outcome of discovery, the ultimate question may be whether those sub-groups—rather than the Task Force—are subject to FACA and its requirements. *See Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 37 (D.D.C. 2002) (App. 189). *See also Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) ("*AAPS*") (noting that subordinate "working group" may be subject to FACA if non-federal employees were members).

Second, there is nothing to suggest that *the President* was substantively involved in the proceedings of the Task Force. President Bush issued a public memorandum announcing the Task Force's creation, was presented with the Task Force's conclusions, and received the Task Force's published report; the evidence submitted by the Petitioners indicates no further role for the President. Knutson Decl. ¶¶ 3-14 (App. 258-262). Vice President Cheney chaired the Task Force, and subordinate agency and White House officials were involved with the activities of the Task Force's subgroups. *Id.* Their presence raises far lesser constitutional concerns than would that of the Chief Executive. *See In re Sealed Case*, 121 F.3d 729, 748-49 (D.C. Cir. 1997). The Constitution does not grant the Vice President, or other Executive branch officials, any of the enumerated Executive powers upon which the doctrine of separation of powers is based. *See Morrison v. Olson*, 487 U.S. 654, 698-99 & 729 (1988) ("[T]he

Founders . . . provided that all executive powers would be would be exercised by a *single* Chief Executive") (Scalia, J., dissenting); *United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (holding that "protection of the confidentiality of Presidential communications" is based on "powers and privileges [that] flow from the nature of enumerated powers").

Third, the District Court's orders do not demand *disclosure* of any materials that "intru[de] into Executive Branch decisionmaking." Pet. 9. The District Court has asked Petitioners to offer specific objections to plaintiffs' proposed discovery, and to specify any privileged information that they wish to withhold; "[c]ompliance with the Court's orders will not necessarily result in the plaintiffs obtaining *any* discovery." *Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 27 (D.D.C. 2002). *See Cheney*, 334 F.3d at 1100-01. If Petitioners believe that plaintiffs' discovery requests are overbroad, they may present objections to assist the District Court in narrowing the scope of the requests. *See id.* at 1105-06. If the discovery requests encompass communications that implicate Executive decisionmaking, Petitioners can assert the constitutional privileges that protect the integrity of such decisionmaking. *See id.* at 1105. *See generally Sealed Case*, 121 F.3d at 752. And if the District Court's construction of those objections and privileges threatens the disclosure of information that would genuinely inhibit Executive functions, Petitioners may then seek this Court's intervention to prevent that disclosure. *See In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000) (party may seek writ of mandamus to challenge order requiring "disclosure [of

highly privileged material]" (alteration in original and citation omitted)).[1]

The District Court's orders will result in only this: eight Department of Justice attorneys will review twelve boxes of documents, prepare objections to plaintiffs' proposed discovery, and assemble a privilege log substantiating Petitioners' reasons for withholding any confidential information. Defts. Response to Order of Oct. 28 (Oct. 29, 2002) ("Defts. Response") at 1-2 (describing efforts needed to comply with orders). As Petitioners now admit, the sole burden imposed by those tasks is "review [of] the process" by which the Task Force operated. Pet. 5. That burden will not materially affect Presidential decision-making, and cannot offend separation of powers or cause irreparable harm. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 451-52 (1977) ("mere screening of [Executive] materials" for purposes of privilege assertion "constitutes a very limited intrusion" and does not violate separation of powers); *Renegotiations Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable

[1] Petitioners contend that the panel majority ignored *In re Sealed Case*, 151 F.3d 1059 (D.C. Cir 1998) (*Sealed Case II*). Pet. 6. In *Sealed Case II*, this Court issued a writ of mandamus because the independent counsel "was ordered to produce . . . the documents requested," *Sealed Case II*, 151 F.3d at 1062, in an ancillary civil proceeding, after the petitioner "asserted something akin to a privilege," *id.* at 1065. Mandamus was therefore required to prevent the "*disclosure* of arguably *'privileged'* material," *id.* (emphasis added). The panel majority here refused to issue the writ precisely because the District Court's orders require no such disclosure. *Cheney*, 334 F.3d at 1104.

cost, does not constitute irreparable injury." (citation omitted)).[2]

A contrary conclusion would be tantamount to a ruling that any discovery of any Executive official, in and of itself, violates separation of powers—a proposition that the Supreme Court and this Court have squarely rejected. "[T]he Judiciary may severely burden the Executive Branch by reviewing the legality of [even] the President's official conduct." *Clinton v. Jones*, 520 U.S. 681, 705 (1997); *Dellums v. Powell*, 561 F.2d 242, 245-46 (D.C. Cir. 1977). The District Court is following the well-established ground-rules governing litigation against the Executive—under which discovery is permitted, but circumscribed by the rules of Executive privilege. *See Sealed Case*, 121 F.3d at 742-746. Those rules create no "exceptional circumstances" that would warrant interlocutory appeal or justify rehearing. *Cheney*, 334 F.3d at 1101-02.

For the reasons set forth in the panel majority and concurring opinions, as well as those above, the District Court's orders have not created any "separation of powers conflict." *Id.* at 1105. As explained in Section II, below, this case does not present an inevitable

[2] The dissenting opinion quotes *Nixon v. Fitzgerald* as recognizing that "diversion of the [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Cheney*, 334 F.3d at 1117 (quoting 457 U.S. 731, 751 (1982)). The Supreme Court has dismissed that language as "dicta," and clarified that "our dominant concern [in *Nixon*] was with diversion of the *President's* attention . . . caused by needless worry as to the *possibility of damages actions* stemming from any particular official decision." *Clinton*, 520 U.S. at 694 n.19 (emphasis added). That concern does not apply; this suit does not seek damages, and is not directed at the President.

"collision" between FACA and the Constitution. Pet. 9. And, as detailed in Section III below, even if the Court were to bypass the normal high standards governing interlocutory appeal, Petitioners are wrong on the merits; the law does not prevent discovery in this case.

II. THIS CASE PRESENTS NO INEVITABLE CONSTITUTIONAL "COLLISION"

The District Court has not yet had an opportunity to determine whether any non-federal employees participated in the activities of Task Force sub-groups, or the Task Force itself, in a manner that, under *AAPS*, would implicate FACA.[3] Petitioners nevertheless ask this Court to over-rule *AAPS* on constitutional grounds, and to re-define "members" of advisory committees to be only those that the government formally designates as members. Pet. 9-11. There is no reason to reach that issue before it is presented; "a court should avoid, not seek out, a constitutional issue the resolution of which is not essential to the disposition of the case before it." *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Further factual and legal development—in particular, as regards the Task Force's sub-groups—could significantly

[3] This Court recognized in *AAPS* that if a private citizen "regularly attends and fully participates in [advisory committee] meetings as if he were a 'member,' he should be regarded as a member." 997 F.2d at 915. Because "his status as a private citizen would disqualify the working group [at issue] from [FACA's] exemption for meetings of full-time government employees," the sub-group or group in which that person participated would be subject to FACA, and the government's failure to abide by FACA's disclosure provisions would violate the law. *Id.*

change the contours of that constitutional issue, or eliminate it entirely.[4]

A. The Task Force's Sub-Groups Present Lesser Constitutional Concerns, If Any

Petitioners present the most difficult constitutional issue encompassed within the complaints' allegations: whether FACA could be applied to the President's interactions with the Task Force. That issue may never arise. The Task Force was assisted by numerous lower-level White House and agency staff, some of whom created subordinate "working groups" to address particular issues. *See* U.S. General Accounting Office, Energy Task Force: Process Used to Develop the National Energy Policy (August 2003) (attached as Ex. A) at 7, 11-16 (describing "Support Group" and "Working Group" in addition to Task Force Principals). *See also* Knutson Decl. ¶ 13 (App. 261-62); Complaint ¶¶ 18-24 (App. 189). The Task Force's sub-groups did not necessarily comprise "the President's closest advisors," Pet. 1; even the highest working group was chaired by an Energy Department employee "assigned" to the Vice President's office to assist the Task Force. Knutson Decl. ¶ 3 (App. 258).[5]

[4] As the District Court recognized, there is no principled way to determine whether application of the statute would violate the Constitution until discovery has demonstrated which specific activities would otherwise be governed by FACA. *See Judicial Watch*, 219 F. Supp. 2d at 45-46 (App. 192) (noting that analysis requires "nuanced, fact-intensive" inquiry).

[5] It is not yet clear how many sub-groups existed, and what lower-level staff they included. Plaintiffs' discovery is intended, in part, to determine how many such sub-groups existed, and to establish that they met the definition of an "advisory committee"

Discovery may show that energy industry representatives were members (*de facto* or otherwise) of one or more of the subordinate working groups, but not the Task Force – an identical scenario to that presented in *AAPS*. 997 F.2d at 912. *See* Ex. A at 15-18. That scenario would raise none of the constitutional issues suggested by Petitioners and by the dissenting opinion, *Cheney*, 334 F.3d at 1117; it would not require the District Court or this Court to apply FACA to the Task Force. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (Constitution affords "high officials . . . greater protection than those with less complex discretionary responsibilities"). *See also Sealed Case*, 121 F.3d at 748 ("[T]he separation of powers concerns that arise when the President is personally subjected to judicial process are not implicated when a court exercises jurisdiction over other executive branch officials.").

This case is as much about the Task Force's subordinate groups as it is about the Task Force itself. Petitioners ask the Court to make a premature, unnecessary, and challenging constitutional ruling, with sweeping implications. In so doing, they ignore a significant portion of plaintiffs' claims, and the myriad factual and legal developments that could obviate the need for that ruling.

set out in *AAPS*. 997 F.2d at 913-15 (noting that whether collection of individuals may be considered an "advisory committee" for purposes of FACA depends on whether they "render advice or recommendations, *as a group*, and not as a collection of individuals" and "significantly interact with each other"). That determination requires some investigation into interactions between Task Force staff and personnel. *See Cheney*, 334 F.3d at 1105-06 (questioning need for information concerning such interactions). The District Court has indicated that it will tailor that investigation to avoid any inappropriate intrusion into Executive decisionmaking; for example, it may limit inquiry to the interactions of those Task Force staff and personnel who communicated significantly with private citizens. *See Judicial Watch*, 233 F. Supp. 2d at 30 (D.D.C. 2002) (promising "tightly reined" discovery).

B. This Court Should Not Over-Rule AAPS Or Issue A Writ of Mandamus Before Any Constitutional Issue Has Been Presented

As the District Court and panel majority recognized, there is no need to address FACA's constitutionality or the validity of *AAPS*, as applied to the Task Force, until the facts and law present that issue. *Judicial Watch*, 219 F. Supp. 2d at 37 (App. 189); *Cheney*, 334 F.3d at 1108. Until then, Petitioners face only two burdens: (1) the need to respond to plaintiffs' discovery, via objections, assertions of privilege, and the disclosure of non-privileged, non-objectionable materials; and, (2) the possibility that the Court might eventually find that FACA could be applied to the Task Force. Neither of those burdens merits a writ of mandamus. The first implicates no significant constitutional concerns. *See above*, pages 3-4. And the possibility that a court might apply FACA to the Task Force imposes no burden at all. Petitioners claim that this case will "cause the President to hesitate before creating any formal . . . group consisting wholly of heads of executive departments." Pet. 11. As this Court held in rejecting a virtually identical claim:

> [W]e do not take seriously [the Executive Office of the President]'s argument that the President and the members of the White House Office are now disabled from functioning because of an implicit threat underlying the District Court's order. . . .

> In activities unrelated to the instant case, the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that [the Act] does not cover members of the White House Office.

Executive Office of the President, 215 F.3d at 24-25. If the District Court eventually finds that the Task Force was subject to FACA, and that FACA may be constitutionally applied to the Task Force, that decision will "be subject to review on appeal following final judgment." *Id.* Until then, this case has no effect on the White House's conduct.

In short, this case presents no reason to depart from the normal rules governing judicial review. The dissenting opinion would over-turn *AAPS* now, because *AAPS* lacks "any principled standard for determining who and who is not a *de facto* member of a Presidential committee." *Cheney*, 334 F.3d at 1115.[6] The standard set out in *AAPS*—whether a private citizen "regularly attend[ed] and fully participate[d] in working group meetings as if he were a 'member'"—presents ques-

[6] Allowing the government to unilaterally define a committee's members may present an easier standard, but—as with any standard based on form rather than substance—it would allow the government to evade FACA at will. President Clinton, for example, could have named only full-time federal employees as formal "members" of his Health Care Task Force, while delegating policy-making authority to private citizens whom he labeled "consultants." *See AAPS*, 997 F.2d at 915. That result would ill serve Congress's intent to "ensure 'public accountability' on the part of the Executive Branch." *Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 433 (D.C. Cir. 1989) (Edwards, J., concurring in part and dissenting in part).

tions of the sort routinely resolved in civil litigation. *See, e.g., In re Vebeliunas*, 332 F.3d 85, 91 (2d Cir. 2003) (applying New York law governing piercing the corporate veil, asking whether "the owner exercised such control that the corporation has become a mere instrumentality of the owner"). To the extent that answering those questions entails discovery of Executive decision-making, the law provides various privileges to prevent the disclosure of information that would genuinely inhibit Executive functions. *Sealed Case*, 121 F.3d at 742-53 (describing privileges and noting that executive privilege extends as far as necessary to avoid "imped[ing] the President's ability to perform his constitutional duty" (citation omitted)).

The district courts have consistently handled such potentially sensitive matters without infringing upon Executive prerogatives. *E.g., Association of Am. Physicians & Surgeons v. Clinton*, 879 F. Supp. 103 (D.D.C. 1994) (determining documents to which plaintiffs would be entitled under de facto membership theory); *Natural Resources Def. Council v. Curtis*, 189 F.R.D. 4 (D.D.C. 1999) (establishing discovery guidelines in FACA case); *Alexander v. F.B.I.*, 194 F.R.D. 299 (D.D.C. 2000) (applying discovery and privilege rules in response to document requests directed towards White House offices). The District Court is fully capable of doing so here. *See Clinton*, 520 U.S. at 704 ("Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty.").

III. THE LAW DOES NOT CATEGORICALLY FORBID DISCOVERY IN THIS CASE.

Petitioners have not demonstrated harm sufficient to warrant interlocutory review. *Cheney*, 334 F.3d at 1104. Even if such review were appropriate, moreover, the District Court's refusal to foreclose discovery is wholly in keeping with established law.

A. The Rules Permit Discovery Regardless of a Party's Status.

Discovery is an essential component of judicial review. The law consequently provides a "broad presumption . . . in favor of discovery," tempered only by the exceptions set out by the available privileges. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1349 (D.C. Cir. 1984) (Starr, J., dissenting) (citing J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 26.5 (2d ed. 1976). "[N]o type of action, within the coverage of the Federal Rules, is excepted from the operation of [the discovery] rules." *Weisberg v. Webster*, 749 F.2d 864, 868 (D.C. Cir. 1984). Those rules establish that "'the public . . . has a right to *every man's* evidence,' except for those persons protected by a constitutional, common-law, or statutory *privilege*." *United States v. Nixon*, 418 U.S. at 709 (alterations in original, emphasis added, and citation omitted). The general rule is, accordingly, that discovery is permitted regardless of a party's status, barring only the assertion of a valid privilege: "[I]t would be quite anomalous indeed for a witness . . . to be permitted to avoid testifying merely because of his status. That is simply not the way our system works. Anyone who enjoys a privilege against testifying must assert it . . . ." *United States v. North*, 910 F.2d 843, 951 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part) (discussing executive privilege), *decision withdrawn and superceded in unrelated part by United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).[7]

Petitioners ask this Court to reverse that rule, and demand more than "mere unsupported allegations" before proceeding to discovery. Pet. 5. Until discovery, however, a plaintiff need only offer allegations; "the liberal system of 'notice pleading' set up by the Federal Rules" requires "only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Leatherman v. Tarrant Cty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993) (citation omitted). The Rules do not permit the judiciary to impose a greater threshold requirement. *Id.* at 168-69. Rather, courts "rel[y] on liberal discovery rules and summary judgment motions to define disputed facts and issues and dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 & 514 (2002).

That process presents no significant danger of harassment of the Chief Executive. *See* Pet. 11. While the Rules allow plaintiffs to pursue factual development through discovery, they do not permit the filing of baseless suits. Rule 11 demands that "any papers filed with the court [be] well grounded in fact [and] legally tenable." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S.

---

[7] The majority in *United States v. North* quashed the subpoena at issue on entirely separate grounds. 910 F.2d at 890 (subpoenaed testimony "immaterial to North's defense"). Judge Silberman would have allowed discovery, and therefore dissented from the majority opinion. *See id.* at 948-50. In so doing, Judge Silberman concluded that executive privilege provided no bar to discovery—an issue the majority did not reach.

384, 393 (1990). Those standards are demonstrably met here. The participation of energy industry representatives in the Task Force's proceedings has been well documented by Congress and the press. *See* Ex. A. Established privileges and the District Court's discretion to control the discovery process, meanwhile, provide ample means to ensure that discovery does not interfere with Executive functions. *See above*, Section I.

B. There Is No Rule Preventing Discovery Of Government Officials

The dissenting opinion posits a rule prohibiting any "discovery into the internal workings of government departments without 'strong preliminary showings of bad faith." *Cheney*, 334 F.3d at 1115-16. As the panel majority recognized, there is no such narrow rule. *Id.* at 1111. *See also National Nutritional Foods Ass'n v. Food & Drug Admin.*, 491 F.2d 1141, 1145 n.5 (2d Cir. 1974) (noting that discovery is permitted where the government's submissions "do[] not provide an adequate basis for judicial review" (citation omitted)). The law does provide privileges to protect government deliberations; notably, the 'deliberative process privilege' protects "intra-agency memoranda and other documents recording how and why decisions or recommendations have been reached." *Cheney*, 334 F.3d at 1115-16 (Randolph, J., dissenting). *See Sealed Case*, 121 F.3d 737-38. *See also Checkosky v. Securities & Exchange Comm'n*, 23 F.3d 452, 489 (D.C. Cir. 1994) (Randolph, J.) ("[A]gency deliberations. . . are *privileged* from discovery) (emphasis added)).

Those privileges must, however, be properly invoked —something Petitioners have refused to do. Neither the deliberative process nor any other privilege insulates *all* information within Petitioners' control from discovery, any more than the attorney-client privilege insulates all information in an attorney's possession from discovery. *See Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (agency invoking deliberative process privilege under Freedom of Information Act ("FOIA") bears the "burden of 'establish[ing] [its] right to withhold evidence" (citation omitted)); *Doherty v. Fairall*, 413 F.2d 381, 381 (D.C. Cir. 1969) (Burger, J.) (rejecting claim that privilege protects materials in attorney's possession). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1973) (deliberative process privilege under FOIA is coextensive with privilege in civil litigation).

Much of what plaintiffs seek—*e.g.* the extent of private citizens' participation in the sub-groups' and Task Force's activities—does not implicate intra-agency memoranda or the agency's deliberative processes. *See U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12-13 (2001) (deliberative process privilege does not apply to communications with non-government personnel). Petitioners cannot withhold such materials simply by virtue of Petitioners' status as federal employees; they must demonstrate that the withheld documents do, in fact, relate to protected deliberative processes, by properly asserting the deliberative process privilege. The District Court has invited Petitioners to make that showing. Unless and until they do so, Petitioners are subject to the normal rules of civil litigation. *See Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) ("[A]n executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, *not the mere fact of high station.*" (emphasis added)).

C. The Administrative Procedure Act Does Not Prohibit Discovery.

As the both the majority and the dissent recognized, the Administrative Procedure Act cannot bar discovery, because this case is not governed by the Administrative Procedure Act; it is brought pursuant to the federal mandamus statute, 28 U.S.C. § 1361 (2003). *Cheney*, 334 F.3d at 1103, 1113 n.1 & 1116. Even if Administrative Procedure Act standards did apply, they would not prohibit discovery under all circumstances; *inter alia*, the Act permits discovery where "the administrative record is inadequate for judicial review." *Id.* at 1111 (Edwards, J., concurring). The District Court expressly found here that the "record" submitted by Petitioners—"which consists in its entirety of the President's memorandum to the Vice-President establishing the [Task Force], the [Task Force]'s final report, and [the litigation] affidavit of the [Task Force]'s former Deputy Director"—is "so bare that it prevents effective judicial review." *Judicial Watch*, 233 F. Supp. 2d at 29-30.

Petitioners argue that the President's memorandum conclusively establishes the composition of the Task Force, and that the District Court may not permit discovery to investigate whether "the President was disobeyed." Pet. 14. As a factual matter, the memorandum does not instruct the Vice President to exclude private citizens. App. 117. As a legal matter, the Administrative Procedure Act would not permit Petitioners to selectively disclose some documents, withhold others, and then insist that the disclosed documents are conclusive. *See Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review less than the full administrative record might

allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'"). And in any event, the memorandum says nothing about the composition of the various subgroups that supported the Task Force's activities, though it expressly authorizes the establishment of such "subordinate working groups to assist the [Task Force] in its work." App. 118.

D. Petitioners Are Not Immune From Suit

Petitioners have no constitutional immunity from this suit, or any other civil suit seeking injunctive relief. *See Harlow v. Fitzgerald*, 457 U.S. 800, 808-17 (1982) (immunity extends only to suits seeking civil damages). That clear contrary law notwithstanding, Petitioners ask this Court to extend them "immunity" from discovery, claiming that the panel majority "sidestepped" this Circuit's decision in *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). Pet. 6. In *Papandreou* this Court considered, via mandamus, a claim of "sovereign immunity," reasoning that the law of sovereign immunity conferred "immunity from trial and the attendant burdens of litigation." 139 F.3d at 251 (citation omitted). Not even the President possesses a comparable immunity; the Supreme Court has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton*, 520 U.S. at 703. Petitioners are not immune from the "burdens of litigation," *Papandreou*, 139 F.3d at 251. As the Supreme Court has held: *"[t]he fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of [even] the Chief Executive is not sufficient to establish a violation of the Constitution."* *Clinton*, 520 U.S. at 703.

IV. CONCLUSION

For the reasons set forth above, Sierra Club and Judicial Watch respectfully request that the petition for rehearing be denied.

Respectfully submitted this 29th day of August, 2003,

By:

_____

David Bookbinder
DC Bar No. 455525)
Sierra Club Environmental Law Program
408 C Street, NE
Washington, DC 20002
(202) 548-4598

Patrick Gallagher
(CA Bar No. 146105)
Alex Levinson
(CA Bar No. 135307)
Sanjay Narayan
(CA Bar No. 183227)
85 Second Street
San Francisco, CA 94104
(415) 97705769

Roger Adelman
(DC Bar No. 056358)
Law Offices of Roger Adelman
1100 Connecticut Ave., N.W.
Suite 730
Washington, D.C. 20036

Counsel for Appellee Judicial Watch, Inc.

CERTIFICATE OF SERVICE

I certify that on August 29, 2003, I served the foregoing "Response to Petition for Rehearing and to Suggestion for Rehearing En Banc" on counsel for all parties at the addresses, and by the means specified, below:

By Email and Federal Express

Mark Stern
U.S. Department of Justice
Civil Division
601 D Street, NW
Washington, DC 20530-0001
Mark.stern@usdoj.gov

Counsel for Appellant Vice President Richard Cheney

By Email

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Avenue, NW
Washington, DC 20009
Howardcrystal@meyerglitz.com

Counsel for amicus Natural Resources Defense Council

_____

David Bookbinder

Supreme Court, U.S.
FILED
FEB 5 2004
OFFICE OF THE CLERK

No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
DAVID B. SALMONS
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, *et seq.*, can be construed, consistent with the Constitution, principles of separation of powers, and this Court's decisions governing judicial review of Executive Branch actions, to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this case.

PARTIES TO THE PROCEEDINGS

The petitioners are Richard B. Cheney, Vice President of the United States; John W. Snow, Secretary of the Treasury; Gale A. Norton, Secretary of the Interior; Ann M. Veneman, Secretary of Agriculture; Donald L. Evans, Secretary of Commerce; Norman Y. Mineta, Secretary of Transportation; Spencer Abraham, Secretary of Energy; Colin L. Powell, Secretary of State; Joseph L. Allbaugh, Director, Federal Emergency Management Agency; Michael O. Leavitt, Administrator, Environmental Protection Agency; Patrick H. Wood, III, Chairman, Federal Energy Regulatory Commission; Joshua B. Bolten, Director, Office of Management and Budget; Stephen Friedman, Assistant to the President for Economic Policy; Andrew Lundquist, former Executive Director of the now defunct National Energy Policy Development Group; and John D. Ashcroft, U.S. Attorney General.

The plaintiffs below, Judicial Watch, Inc. and the Sierra Club, are respondents here. Because this case involves a mandamus action, the United States District Court for the District of Columbia is also a respondent.

The following individuals were named as defendants but were dismissed from the case prior to the petition/appeal: Mark Racicot, Haley Barbour, and Thomas Kuhn. Another individual, Kenneth Lay, was named as a defendant in the Complaint but did not appear. The National Energy Policy Development Group, which ceased to exist on September 30, 2001, was also named as a defendant, but was subsequently dismissed by the district court. The following individuals were named as defendants in their official capacities and have subsequently been succeeded in office by the individuals identified above: Paul O'Neill, Secretary of the Treasury; Christine Todd Whitman, Administrator, Environmental Protection Agency; Mitchell E. Daniels, Jr.,

Director, Office of Management and Budget; Larry Lindsey, Assistant to the President for Economic Policy.

The National Resources Defense Council appeared as amicus curiae in the district court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
A. The Federal Advisory Committee Act	2
B. The National Energy Policy Development Group	3
C. The Litigation below	5
Summary of argument	8
Argument	12
I. The construction of FACA adopted below has no basis in the text of the statute and would violate fundamental principles of the separation of powers and judicial review of Executive Branch actions	12
A. The decisions below expand FACA's requirements beyond the limits set by Congress	13
1. By its terms, FACA's application turns on the formal membership of an advisory group, as defined by the President	14
2. The de facto member doctrine is inconsistent with FACA's text	16
3. This Court should reject the de facto member doctrine to avoid a construction of FACA that would, at a minimum, raise serious constitutional concerns	20
B. The approach adopted below violates the presumption of regularity and other settled principles governing judicial review of Executive Branch actions	22

Table of Contents—Continued: Page

1. The discovery ordered below was precluded by the constitutionally grounded presumption of regularity applicable to Executive Branch actions 22
2. Other principles of judicial review of Executive Branch actions precluded the constitutionally problematic discovery ordered below 24

C. The expansion of FACA adopted below violates the constitutional doctrine of separated powers 28
1. The NEPDG's information-gathering and policy-developing activities for the President are within his exclusive responsibilities under Article II and beyond Congress's legislative powers 28
2. The decisions below cannot be reconciled with *Public Citizen* 35

II. The Court of Appeals' jurisdictional rulings conflict with this Court's cases and improperly immunize serious separation-of-powers violations from meaningful judicial review 38
A. The Court of Appeals had mandamus jurisdiction 40
B. The Court of Appeals had appellate jurisdiction 43
C. Petitioners' separation-of-powers claims are not stale 44

Conclusion 47

TABLE OF AUTHORITIES

Cases: Page

Association of Am. Physicians & Surgeons, Inc. v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993) 7-8, 15, 17, 33
Barenblatt v. *United States*, 360 U.S. 109 (1959) ... 31, 32, 34
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 26, 27
Commercial Drapery Contractors, Inc. v. *United States*, 133 F.3d 1 (D.C. Cir. 1998) 27
Dellums v. *Powell*, 561 F.2d 242 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977) 23
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 21
Food Chem. News v. *Young*, 900 F.2d 328 (D.C. Cir.), cert. denied, 498 U.S. 846 (1990) 3
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) ... 24, 25, 37
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 24
Heckler v. *Ringer*, 466 U.S. 602 (1984) 25, 26
INS v. *Chadha*, 462 U.S. 919 (1983) 31
Kendall v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) 25
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980) 38
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 25
Mississippi v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866) 25
Morrison v. *Olson*, 487 U.S. 654 (1988) 34
Nader v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) 19, 40
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 34
Papandreou, In re, 139 F.3d 247 (D.C. Cir. 1998) 42, 44
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 26

Cases—Continued: Page

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 32
Public Citizen v. *Department of Justice*, 491 U.S. 440 (1989) ..... *passim*
Schick v. *Reed*, 419 U.S. 256 (1974) 32
Simplex Time Recorder Co. v. *Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985) 23
Starbuck v. *City & County of San Francisco*, 556 F.2d 450 (9th Cir. 1977) 24
United States v. *Armstrong*, 517 U.S. 456 (1996) 23
United States v. *Chemical Found.*, 272 U.S. 1 (1926) 23
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1871) 31
United States v. *Nixon*, 418 U.S. 683 (1974) 7, 32, 43, 44
United States v. *Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989) 42, 43
United States Postal Serv. v. *Gregory*, 534 U.S. 1 (2001) 23

Constitution, statutes and regulations:

U.S. Const. Art. II ..... *passim*
§ 1 28
§ 2:
Cl. 1 (Opinion Clause) ..... *passim*
Cl. 2 (Appointments Clause) 33
§ 3:
(Recommendation Clause) ..... *passim*
(State of the Union Clause) 29, 30
Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (5 U.S.C. App. 1 *et seq.*) 2
5 U.S.C. App. 2, at 1 ..... 2, 14
5 U.S.C. App. 2(b)(4)-(6), at 1 2
5 U.S.C. App. 3(2), at 2 ..... 3, 9, 13, 14, 18
5 U.S.C. App. 5(b)(2), at 3 ..... 2, 34
5 U.S.C. App. 5(b)(3), at 3 ..... 2, 34

Statutes and regulations—Continued: Page

5 U.S.C. App. 5(c), at 3 ..... 2, 34
5 U.S.C. App. 6(b), at 3 3
5 U.S.C. App. 7, at 4 2
5 U.S.C. App. 9, at 5 2
5 U.S.C. App. 9(a), at 5 ..... 9, 13, 14, 18
5 U.S.C. App. 10, at 5 2
5 U.S.C. App. 10(d), at 6 41
5 U.S.C. App. 11, at 6 2
Freedom of Information Act, 5 U.S.C. 552 6
3 U.S.C. 106 29
5 U.S.C. 706 27
28 U.S.C. 1291 ..... 7, 44
28 U.S.C. 1361 25
42 U.S.C. 1983 24
41 C.F.R.:
Section 101-6.1003 (2000) 8, 14, 15
Section 102-3.25 (2003) 15

Miscellaneous:

108 Cong. Rec. (1962):
pp. 18,783-18,784 25
p. 20,079 25
pp. 20,093-20,094 25
Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994) 2, 16
66 Fed. Reg. (2001):
p. 37,728 15
p. 37,734 15
James Madison, *Notes of Debates in the Federal Convention of 1787* (W.W. Norton & Co. 1966) 29
National Energy Policy Development Group, *National Energy Policy: Reliable Affordable, and Environmentally Sound Energy for America's* Future (2001) <www.whitehouse.gov/energy/National-Energy-Policy.pdf.> 4, 17

Miscellaneous—Continued: Page

S. Rep. No. 1098, 92d Cong., 2d Sess. (1972) 16
S. Rep. No. 1992, 87th Cong., 2d Sess. (1962) 25
J. Gregory Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079 (1989) 30
Joseph Story, *Commentaries on the Constitution of the United States* § 807 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833) 30
The Federalist, No. 70 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) 29
37 Weekly Comp. Pres. Doc. 988 (June 28, 2001) 4, 5

In the Supreme Court of the United States

No. 03-475

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 334 F.3d 1096. The orders of the district court (Pet. App. 46a-52a) are unreported, although its earlier opinion in the case (Pet. App. 53a-123a) is reported at 219 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on September 10, 2003 (Pet. App. 124a-125a). The petition for a writ of certiorari was filed on September 30, 2003, and certiorari was granted on December 15, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 1, are reproduced in the appendix to the petition (Pet. App. 126a-134a).

STATEMENT

A. The Federal Advisory Committee Act

Congress enacted the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (FACA), in an effort to stem the proliferation of advisory committees composed of non-government experts established to advise the Executive Branch. See 5 U.S.C. App. 2, at 1. Congress was concerned with certain "specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 453 (1989). There was also a concern that committees of purportedly "neutral" outside experts were sometimes selected with the purpose of endorsing and legitimating pre-determined government policies. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 58 (1994).

FACA establishes uniform standards and procedures for the creation and public operation of advisory committees subject to the Act. 5 U.S.C. App. 2(b)(4)-(6), at 1. They must file a charter, hold their meetings in public, make all documentation and records available to the public under the terms of the Freedom of Information Act, and operate within regulatory guidelines promulgated by the General Services Administration. 5 U.S.C. App. 7, 9, 10, 11, at 4-6. Furthermore, "[t]o the extent * * * applicable," presidential advisory committees must have a "fairly balanced" membership and be free of "inappropriate[] influence[] by the appointing authority." 5 U.S.C. App. 5(b)(2), (3), and (c), at 3. The President must explain to Congress his proposals for

action based on, or reasons for rejecting, the recommendations of any presidential advisory committee 5 U.S.C. App. 6(b), at 3.

Congress did not seek through FACA to regulate "every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Public Citizen*, 491 U.S. at 453. Moreover, FACA specifically excludes groups "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 3(2), at 2. See *Public Citizen*, 491 U.S. at 457-458; *Food Chemical News* v. *Young*, 900 F.2d 328, 332-333 (D.C. Cir.) (opinion by Ginsburg, J.), cert. denied, 498 U.S. 846 (1990).

B. The National Energy Policy Development Group

Less than ten days after taking office, President Bush established the National Energy Policy Development Group (NEPDG) as an entity within the Executive Office of the President to advise the President in formulating energy policy. See J.A. 156-159. The President named the Vice President to preside over meetings and to direct the work of the NEPDG and ordered that the membership of the NEPDG shall "consist[] of the following officers of the Federal Government: the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs." *Id.* at 157. The President also authorized the Vice President to invite the Chairman of the Federal Energy Regulatory Commission, the Secretary of State, and "as appropriate, other officers of the Federal Government" to

participate in the work of the NEPDG. *Ibid.* The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Ibid.* It was directed to "gather information, deliberate, and, as specified in this memorandum, make recommendations to the President." *Id.* at 157-158.

On May 16, 2001, the NEPDG submitted to the President, and with his approval published, its report containing recommendations to enhance energy supplies and encourage conservation. See NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* (*NEPDG Report*) at ii (2001) (*available at* <www.whitehouse.gov/energy/National-Energy-Policy.pdf>). The report included a list of the members of the NEPDG. *Id.* at v. In accordance with the President's January 2001 memorandum, J.A. 157, all of the members identified in the NEPDG Report were "officers of the Federal Government." See J.A. 123 (letter from David Addington, Counsel to the Vice President, to respondents' counsel explaining that all of NEPDG's members were officers of the federal government). Indeed, the NEPDG members identified in the Report were precisely the same high-ranking government officials named in the President's memorandum. The NEPDG was terminated on September 30, 2001. *Id.* at 159, 235-236.

On June 28, 2001, the President transmitted to Congress the NEPDG Report and, according to the accompanying message, its "proposals * * * that require legislative action." 37 Weekly Comp. Pres. Doc. 988. In his message, the President stated that "[o]ne of the first actions" he took as President "was to create the [NEPDG] to examine America's energy needs and to develop a policy to put our Nation's energy future on sound footing." *Ibid.* He explained that

the "legislative initiatives" included in the report would help address energy challenges with "enormous implications for our economy, our environment, and our national security." *Ibid.*

C. The Litigation Below

1. Respondents Judicial Watch, Inc. and Sierra Club (hereinafter respondents) filed these consolidated actions against Vice President Cheney, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG included private citizens as unofficial, de facto members and that the NEPDG was therefore an advisory committee subject to FACA and its disclosure and membership requirements. Respondents requested access to NEPDG documents and a declaration that the defendants violated FACA. J.A. 21-23, 39, 151-153. The government filed motions to dismiss, which the district court granted in part and denied in part. Pet. App. 121a.

2. The district court recognized that FACA itself provides no private right of action, but concluded that the statute is enforceable through either the Administrative Procedure Act (APA) or mandamus. Pet. App. 73a-97a. The court also recognized that the Vice President is not an "agency" within the meaning of the APA, *id.* at 78a-79a, but, without deciding the question, left open the prospect that the Vice President could be sued through mandamus, *id.* at 96a-97a. The court therefore refused to dismiss the Vice President from this case. *Ibid.* It also deferred ruling on the government's contention that applying FACA to the NEPDG would violate the separation of powers and interfere with core Article II prerogatives. *Id.* at 97a-119a. Although the court acknowledged "the seriousness of the constitutional challenge raised by defendants," *id.* at 98a, and recognized that discovery could raise related constitutional questions, *id.* at 118a, it nonetheless allowed discovery to proceed on

the premise that it might obviate the need to resolve the constitutional questions, *id.* at 97a-119a.

The court directed respondents to submit a proposed discovery plan, which it approved on August 2, 2002, directing that the government either "fully comply with" respondents' discovery requests or "file detailed and precise object[ions] to any of these requests." Pet. App. 50a-51a. The district court approved the respondents' request for the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and non-government individuals, thereby allowing respondents to pursue discovery on their theory that the NEPDG included unofficial, de facto members. See, *e.g.*, J.A. 220-221, 225, 227-228.

The agency defendants complied with the district court's discovery orders and produced more than 36,000 pages of documents related to the NEPDG. See Pet. App. 5a-6a. Those documents had previously been released in response to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the various departments and agencies headed by members of the NEPDG. With respect to the Vice President, however, the government sought a protective order against discovery from the Office of the Vice President and urged the district court to consider a motion for summary judgment and to rule on the basis of the administrative record and the presumption of regularity afforded Executive action. In addition, the government submitted a declaration of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG. J.A. 235, 238-241. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees. See *id.* at 239-241. Ms. Knutson also stated that the Vice President had not formed any "subordinate working groups" to assist the NEPDG, *id.* at 240, and that the "staff-level Federal employees" that helped to prepare the group's report, referred to as the "Staff Working Group," were each "full-time Federal employees of the departments," *ibid.*

The district court denied the government's motion for a protective order, Pet. App. 47a, and barred the government from filing a motion for summary judgment pending further order of the court, J.A. 242-243.

3. The Vice President and the other non-agency defendants filed a petition for a writ of mandamus, asking the court of appeals to vacate the district court's discovery orders, direct the district court to decide the case on the basis of the administrative record, the Knutson Declaration, and any supplemental declarations that the court might require, and to dismiss the Vice President as a defendant. The Vice President also filed a notice of appeal, invoking the court's appellate jurisdiction under 28 U.S.C. 1291. See *United States* v. *Nixon*, 418 U.S. 683 (1974) (*Nixon I*).

A divided panel of the court of appeals denied relief. The panel majority held that it lacked jurisdiction to issue a writ of mandamus because the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President "can be fully addressed, untethered by anything we have said here, on appeal following final judgment." Pet. App. 19a. The court dismissed the Vice President's appeal for lack of jurisdiction, holding that the absence of any claim of Executive privilege in this case rendered *Nixon I*, *supra*, inapposite. Pet. App. 23a.

Judge Randolph dissented. He emphasized that "[a]s applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality," but that "[t]he decision in this case pushes it over." Pet. App. 31a. Specifically, Judge Randolph criticized the majority's reliance on the holding in *Association of*

American Physicians & Surgeons, Inc. v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*), that an outside consultant may "be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members." Pet. App. 31a, 34a. That holding, Judge Randolph observed, makes "extensive discovery into the Executive Office of the President * * * inevitable." *Id.* at 35a. Judge Randolph concluded that "[f]or the judiciary to permit this sort of discovery, authorized in the name of enforcing FACA—a statute providing no right of action * * * —strikes me as a violation of the separation of powers." *Id.* at 37a. In order to avoid the constitutional difficulties that *AAPS* creates, Judge Randolph urged reliance on a General Services Administration regulation that, during the time period relevant to this case, defined "committee member" to mean "an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." See *id.* at 42a-44a (quoting 41 C.F.R. 101-6.1003 (2000)).

4. On September 10, 2003, the court of appeals denied rehearing en banc, with Judges Randolph, Sentelle, and Roberts dissenting and Judge Henderson noting her recusal. Pet. App. 124a-125a.

SUMMARY OF ARGUMENT

I. This case presents fundamental separation-of-powers questions arising from the district court's orders compelling the Vice President and other close presidential advisors to comply with broad discovery requests by private parties seeking information about the process by which the President received advice on important national policy matters from his closest official advisors. Those orders subject the Vice President and other senior presidential advisors to

discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself, in order to determine whether FACA even applies. They do so, moreover, based *solely* on an unsupported allegation in a complaint that the NEPDG included unauthorized de facto members—an allegation that is contradicted by the President's order creating the NEPDG, by the NEPDG's published report, and by a declaration by a top NEPDG staff person, all of which confirm that the NEPDG had no nongovernmental members, de facto or otherwise. Interpreting FACA to authorize such wide-ranging discovery based solely on a naked assertion of unofficial, de facto members would render the statute plainly unconstitutional. This Court recognized the potential constitutional problems raised by FACA in *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989), and interpreted the statute to avoid those difficulties. Here, the constitutional difficulties raised by the lower courts' view of FACA are more profound, and the construction of the statute that avoids those difficulties is more straightforward.

a. The lower courts' notion of de facto membership has no support in FACA's text and is inconsistent with Congress's judgments that advisory groups under FACA must be "specifically authorized * * * by the President," 5 U.S.C. App 9(a), at 5, and that the statute does not reach groups composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 3(2), at 2. Those provisions limit the separation-of-powers difficulties inherent in FACA by giving the President substantial discretion to determine whether an advisory group he establishes is subject to the statute's disclosure and other requirements. Here, the record is clear that the NEPDG, as "established" by the President, was composed wholly of government officials and employees, and

therefore comes within the statutory exemption of all-government-member advisory groups.

b. The court of appeals' application of the de facto member doctrine effectively eliminates these key textual limitations. By combining the de facto member doctrine with principles of notice pleading and ignoring the presumption of regularity afforded Executive action and the limited availability of discovery in APA and mandamus actions, the courts below would allow plaintiffs to force the opening of sensitive Executive Branch deliberations upon the barest allegation of a deviation from the official membership list. Moreover, in the context of a statute that raises separation-of-powers concerns precisely because of its potential interference with Executive Branch deliberations through, *inter alia*, disclosure, a regime that allows discovery too permissively creates separation-of-powers problems that are not different in kind from those created by a final interpretation of the statute that allows disclosure too permissively.

Moreover, any doubts about FACA's proper interpretation would have to be resolved against a construction that permits almost automatic intrusion on the Executive, in order to avoid serious constitutional difficulties. While this Court has recognized the constitutional problems raised by FACA and has interpreted it to avoid them, see *Public Citizen*, *supra*, 491 U.S. 440 (1989), the decisions by the panel and the district court will routinely generate constitutionally problematic intrusions into the Executive Branch.

c. If FACA does require the kind of judicial inquiry approved by the courts below, then it is unconstitutional as applied to advisory committees established by the President. The President established the NEPDG to obtain from his most senior advisors, including numerous heads of departments, their advice regarding legislation that he should propose to Congress and administrative actions that the Executive Branch should take. The President's ability to communicate freely with those advisors relates to his specific constitutional authority under both the Opinion and Recommendations Clauses to request the opinions of department heads and to propose such legislation as the President may deem necessary. Neither Congress nor the judiciary may interfere with or supervise communications among a group consisting of the Vice President and high-level presidential subordinates assigned to assist the President in deciding what measures to propose to Congress or to order administratively, nor may the other Branches require that those officials be independent of the President or that they include members who disagree with the President's policy priorities.

II. The separation-of-powers violations stemming from the unprecedented discovery ordered below are exacerbated by the court of appeals' erroneous jurisdictional rulings, which would improperly immunize those violations from effective appellate review. Although the court of appeals viewed this case as an ordinary discovery dispute, it is not. The discovery that has been ordered raises the same separation-of-powers problems as the statutorily mandated disclosures that would follow from a final determination that FACA applied to the NEPDG. Thus, treating the orders at issue here as ordinary discovery orders would render unavoidable the kind of separation-of-powers difficulties addressed by this Court in *Public Citizen*.

Nor is the availability of Executive privilege as a basis for opposing release of particular documents adequate protection for the separation-of-powers interests at stake. As this Court's decision in *Public Citizen* recognized, the President's constitutional interests in being able to obtain confidential advice regarding his constitutionally assigned responsibilities is not coextensive with, nor fully protected by the possibility of invoking, Executive privilege.

Nor should the Vice President be required to submit to contempt proceedings before obtaining appellate review of

his constitutional claims. This Court has recognized the separation-of-powers problems inherent in forcing the President to subject himself to contempt in order to obtain appellate review. Those same considerations justify permitting the Vice President to pursue an interlocutory appeal in this case.

ARGUMENT

I. The Construction Of FACA Adopted Below Has No Basis In The Text Of The Statute And Would Violate Fundamental Principles Of The Separation Of Powers And Judicial Review Of Executive Branch Actions

Throughout this litigation, the Vice President has respectfully but resolutely maintained that, in the circumstances of this case, the legislative power and judicial power cannot be utilized to require the Vice President to disclose to private litigants the substance or the details of the process by which a President obtains information and advice from the Vice President, heads of departments and agencies, and assistants to the President in the exercise of powers committed exclusively to the President by the Constitution, including by the Recommendations and Opinion Clauses. See U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. Those Clauses allow the President a zone of autonomy in obtaining advice, including with respect to formulating proposals for legislation. Congress, in turn, has ample opportunity to evaluate and respond to the President's legislative recommendations and administrative actions in any manner it sees fit, consistent with the Constitution. But Congress does not have the power to inhibit, confine, or control the process though which the President formulates the legislative measures he proposes or the administrative actions he orders.

The district court recognized the seriousness of these constitutional concerns, Pet. App. 98a, but then ordered sweeping and intrusive discovery into that process—thereby raising equally serious separation-of-powers problems—based solely on unsupported allegations that, contrary to the President's express directive in establishing the NEPDG, individuals not employed by the government participated as members of the group. By working an unwarranted and textually unsupported expansion of FACA and disregarding established principles of the separation of powers and judicial review of Executive Branch actions, the court of appeals' decision intrudes on vital Executive Branch functions and should be rejected.

A. The Decisions Below Expand FACA's Requirements Beyond The Limits Set By Congress

The court of appeals and the district court read FACA to apply to an advisory group established by the President to consist only of full-time government employees, if a court determines after extensive discovery that the "de facto" membership of the group deviated from that established by the President. That construction has no basis in FACA's text. Indeed, it contradicts Congress's judgments that the "establishment" of a FACA advisory group must be "specifically authorized * * * by the President," 5 U.S.C. App. 9(a), at 5, and that FACA does not apply to groups composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 3(2), at 2. Those provisions are critical to minimizing the separation-of-powers difficulties inherent in FACA, especially with respect to a group established by the President to advise him on important legislative proposals and administrative initiatives.

1. By Its Terms, FACA's Application Turns On The Formal Membership Of An Advisory Group, As Defined By The President

Congress enacted FACA to stem the proliferation of advisory committees established to advise the Executive Branch. See 5 U.S.C. App. 2, at 1. Congress recognized, however, that such regulation of the process by which the President and other Executive Branch officials obtain information necessary to the performance of functions assigned to the Executive Branch by the Constitution implicated important and difficult issues related to the separation of powers. Congress therefore included in FACA two important limitations necessary to avoid unconstitutional interference with core Executive Branch functions.

First, Congress explicitly exempted entirely from FACA's reach all advisory groups composed solely of "full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 3(2), at 2. Second, it left to the President or his subordinates the choice of whether a given advisory group would include outside members and thereby be subject to FACA's balance and disclosure requirements. FACA explicitly envisions *only* advisory committees "established or utilized by the President" or by an agency, *ibid.*, and it expressly forbids the establishment of an advisory committee "unless such establishment is," *inter alia*, "specifically authorized by statute or by the President," 5 U.S.C. App. 9(a), at 5. FACA thus expressly forbids the creation of unauthorized, de facto advisory committees. Accordingly, by its terms, FACA recognizes that the question of whether a group established by the President to give him advice is subject to FACA's requirements is to be determined by the group's formal membership as defined by the President. The relevant General Services Administration regulation, 41 C.F.R. 101-6.1003 (2000), also

makes clear that whether a presidential advisory group is subject to FACA turns on the formal structure given it by the President, including those he designates to participate as members of the group.[1]

Together, these two provisions limit the obvious constitutional difficulties with congressional efforts to regulate the process through which the President obtains advice. Any attempt by Congress to regulate the President's ability to obtain advice from officials in the Executive Branch would unconstitutionally interfere with powers expressly reserved to the President by the Constitution. See, *e.g.*, U.S. Const. Art. II, § 2, Cl. 1 ("The President * * * may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."); see also Part I.C., *infra*. By exempting advisory groups composed exclusively of government officials, FACA avoids obviously unconstitutional applications, such as imposing balance and disclosure obligations on the President's meetings with his own Cabinet. See Pet. App. 41a (Randolph, J., dissenting); *AAPS*, 997 F.2d at 925 (Buckley, J., concurring). Likewise, by ensuring that the President—according to the manner in which he structures the group—has the ability to control whether FACA's disclosure and other requirements apply, FACA contains its own built-in limitations that reduce the potential for unconstitutional interference with core Executive Branch functions.

---

[1] At the time the President formed the NEPDG, the GSA regulation defined "*Committee member*" to mean "an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." 41 C.F.R. 101-6.1003 (2000). Effective August 20, 2001, the General Services Administration revised the "*Committee member*" definition to read "an individual who serves by appointment or invitation on an advisory committee or subcommittee." 66 Fed. Reg. 37,728, 37,734 (2001) (41 C.F.R. 102-3.25).

These provisions reflect Congress's limited concern in enacting FACA. Congress did not seek to regulate all aspects of the process by which the President seeks advice to formulate policies or legislative proposals, especially when the advice comes from government officials. Congress enacted FACA to address "specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 453 (1989). Specifically, Congress reacted to a perceived practice of creating "blue-ribbon" committees of purportedly "neutral" outside experts that would "validate [the] conclusion" that the agency decisionmaker had already reached. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 58 (1994). Accordingly, in explaining why FACA excludes from its coverage advisory groups composed solely of government officials, the Senate Report states that "[a]fter analysis of the hearings and background material, it was felt that the main problems of proliferation, confusion and operational abuse lay with those advisory committees whose membership in whole or in part comes from the public sector." S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). The report further explained that "it was felt that the matter of controlling the number and activities of inside-government committees was better left to the President, the OMB and the agencies, which had sufficient legislative and administrative authority to deal with the problem." *Ibid.*

2. The De Facto Member Doctrine Is Inconsistent With FACA's Text

The NEPDG, as "established" by the President, was carefully designed with the foregoing textual limitations in mind so as not to trigger FACA's requirements. The President established the NEPDG, appointed as its members only

federal officials, and made clear that only "officers of the Federal Government" could be invited to participate in the work of the group. J.A. 156-158. Consistent with that directive, the NEPDG's final report listed only federal officials as members. See *NEPDG Report* at v; see also J.A. 123 (letter from David Addington, Counsel to the Vice President, to respondents' counsel explaining that all of NEPDG's members were federal employees); *id.* at 239-241 (Knutson Declaration describing membership of NEPDG and staff-level working group). Indeed, the members identified in the NEPDG's report coincide precisely with those officials named in the President's memorandum establishing the group. At the time he established the NEPDG, therefore, and throughout the process, the President neither invoked FACA's provisions nor had any reason to think them applicable to the NEPDG.

The court of appeals, relying on its prior decision in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*), ignored these facts and held that FACA's application to a working group established by the President is determined not by the President's directions in establishing the group, but through an indeterminate, post-hoc calculus assessing whether any persons outside the government should be deemed to have participated as "de facto" members. In *AAPS*, the court of appeals held that courts could look beyond formal membership to determine whether persons designated as short-term "special government employees" or "consultants" to working groups associated with President Clinton's Health Care Task Force "may still be properly described as * * * member[s] of an advisory committee," because their "involvement and role are functionally indistinguishable from those of the other members." *Id.* at 915. The decisions below extend *AAPS* far beyond the advisory process at issue in *AAPS*, which expressly included non-governmental advisors, to the NEPDG

—a group of advisors formally, explicitly, and categorically established by the President to be composed exclusively of government officials.

The de facto member doctrine, particularly as applied in this case, has no support in FACA's text. Indeed, such a doctrine, especially when combined with notice pleading and disregard for the presumption of regularity, would effectively repeal both FACA's textual exemption for advisory groups made up exclusively of governmental officials, see 5 U.S.C. App. 3(2), at 2, and its requirement that the "establishment" of a FACA advisory group must be "specifically authorized * * * by the President," 5 U.S.C. App. 9(a), at 5. In disregard of the clear implication of FACA's text and the relevant General Services Administration regulation, such an approach would limit the President's ability to collect advice from selected members of his own Administration and would make the President's memorandum establishing the NEPDG largely irrelevant to the question of FACA's applicability. Instead, courts would undertake a standardless, amorphous, post-hoc review in every case to decide whether contacts between government officials and private persons or entities might render a committee or working group an "advisory committee."

The notion that FACA's application would turn on such a formless, post-hoc judicial inquiry is impossible to square with the statute's text. First, the express statutory exclusion for advisory groups consisting only of government officers would have little practical value if a mere allegation of an unofficial member could subject any all-government-group—from the Cabinet on down—to intrusive discovery that raises the same constitutional concerns as would a final judicial determination that FACA applies. Moreover, FACA's focus on the need for the President to establish an advisory committee, as defined by the Act, and its prohibition on unauthorized advisory committees are plainly

inconsistent with the concept that such committees can retroactively spring to life by virtue of a post-hoc judicial determination that unauthorized members participated in the group's deliberations. Likewise, a statute that focuses on the President's official actions in establishing a committee and does not create a private cause of action should not be construed to invite litigation concerning whether the committee somehow deviated from the official directive of the President.

Finally, FACA's emphasis on membership and the official actions required to establish an advisory committee obviated the need for Congress to include a definition of membership. The courts are accordingly without direction in devising standards of how much participation makes someone a "de facto member."

Nor is the de facto member concept necessary to address the concerns that led to FACA's enactment. As a matter of logic, an advisory committee that does not even acknowledge the participation of outside experts cannot simultaneously use the participation of outside experts to bolster the legitimacy of the advisory committee's conclusions. To the contrary, when the President limits participation in an advisory group to government officials, the President and those officials alone remain responsible and accountable for any proposals or orders that result.

Congress manifested no intention to regulate every Executive Branch meeting or to guard against the possibility that Executive Branch officials will absorb information from outside sources when forming the views they share with their colleagues and, ultimately, the President. It has always been understood that FACA does not regulate "every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Public Citizen*, 491 U.S. at 453. See *Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) (meetings between presidential assistant,

federal officials and varying private sector groups not subject to FACA). It is therefore plain that Congress did not intend to preclude federal employees from meeting with private persons or to trigger FACA's requirements when such meetings occur.

The proposition urged by respondents, and accepted by the courts below, is that at some unidentifiable point, meetings with one or more private persons may become sufficiently frequent that the private persons should be judicially vested with the attributes of membership. Nothing in the language, structure or purpose of FACA suggests that Congress would have intended this standardless inquiry with obvious constitutional ramifications, particularly where, as here, the President expressly establishes the group as composed solely of government officials. Accordingly, this Court should reject the de facto member doctrine.

3. This Court Should Reject The De Facto Member Doctrine To Avoid A Construction Of FACA That Would, At A Minimum, Raise Serious Constitutional Concerns

As this case amply illustrates, and as Judge Randolph explained in his dissent below, see Pet. App. 31a-38a, 43a-45a, even if a court were ultimately to determine that no outsider served as a "de facto member" on a presidential advisory group, the litigation process approved by the district court itself creates an unwarranted intrusion into Executive Branch affairs that is not permitted by the Constitution and that was never intended by Congress. Because the de facto member doctrine, as applied below, requires a court to disregard the Executive's own description of its committee, discovery into the operations of the group is virtually inevitable. That consequence is particularly anomalous in the FACA context, because discovery obligations may, as in this case, be at least as intrusive as the disclosure

obligations imposed by FACA itself. While FACA requires the disclosure only of the committee's deliberations in its meetings and (subject to FOIA exemptions) its records, a standardless search for de facto members can lead to a broader inquiry into whether any outside individual, whether intentionally or not, crossed a poorly-defined line and became a de facto member. Even if that discovery confirms (as it would in this case) the President's account of the committee he created, the intrusion on the Executive Branch will be complete. The government will have been required to submit to intrusive, invasive, and burdensome discovery into documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and non-government individuals. See, *e.g.*, J.A. 220-221, 225-226, 227-228.

Application of FACA to close presidential advisors has long raised significant separation-of-powers concerns—as the members of this Court unanimously recognized in their opinions in *Public Citizen*. See 491 U.S. at 466-467, 486-489. The court of appeals' extra-statutory de facto member doctrine plainly "pushes [FACA] over" the constitutional edge. Pet. App. 31a (Randolph, J., dissenting); *id.* at 41a (noting that "[d]iscovery on the basis of allegations of *de facto* membership" is indistinguishable from "a [patently unconstitutional] law requiring all groups within the Executive Office of the President to disclose publicly not only their advice to the President but also all their records"). The inevitability of such constitutionally problematic discovery is a sufficient basis to reject the de facto member doctrine under the canon of constitutional avoidance. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Indeed, contrary to the approach taken by the court of appeals and the district court in this case, this Court in

Public Citizen went to great lengths to impose limits on FACA to avoid an unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. 491 U.S. at 466-467. This case implicates analogous —indeed, even more serious—separation-of-powers difficulties with the same statute. See Part I.C.2, *infra*. Those difficulties can be avoided by simply interpreting the statute as written to exclude committees established by the President with only governmental members.

B. The Approach Adopted Below Violates The Presumption Of Regularity And Other Settled Principles Governing Judicial Review Of Executive Branch Actions

The courts below exacerbated the difficulties caused by the de facto member doctrine by ignoring decisions of this Court affording a presumption of regularity to Executive action and limiting discovery in APA and mandamus actions. The separation-of-powers problems inherent in the discovery ordered below could have been avoided by proper application of those longstanding principles of judicial review of Executive actions.

1. The Discovery Ordered Below Was Precluded By The Constitutionally Grounded Presumption Of Regularity Applicable To Executive Branch Actions

By ordering broad discovery against the Vice President based only on an unsupported—and, in fact, contradicted—allegation that the group he chaired to assist the President was not constituted as the President expressly directed and the group itself reported, the district court turned the traditional presumption of regularity applicable to Executive Branch actions on its head. Indeed, the district court was explicit on this point, basing its sweeping discovery orders on its observation that "the government doesn't always comply with the law." J.A. 196-197 (8/2/02 Hearing Tr.).

That approach is flatly inconsistent with this Court's holding that "*in the absence of clear evidence to the contrary*, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926)) (emphasis added); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). That presumption has particular force with respect to actions of the President and Vice President. As this Court explained in *Armstrong*, the presumption of regularity "rests in part on an assessment of the relative competence" of Executive Branch officials and courts, as well as on "a concern not to unnecessarily impair the performance of a core executive constitutional function." 517 U.S. at 465.

Those concerns warrant strict adherence to the presumption of regularity in this case. The President and the Vice President are in the best position to know how the NEPDG's advisory activities were structured. Moreover, ignoring the presumption of regularity and routinely ordering intrusive discovery to determine whether FACA even applies would unnecessarily impair the performance of core Executive responsibilities and raise serious constitutional questions. Applying the presumption of regularity and requiring the plaintiff to come forth with "clear evidence"—not mere allegations—before assuming a deviation from the President's directions would avoid the difficulties engendered by the approach of the courts below.[2]

---

[2] In addition, respondents have not demonstrated any heightened showing of need, as is usually necessary—although often not sufficient—to obtain discovery into Executive Branch decisionmaking. See *Dellums* v. *Powell*, 561 F.2d 242, 245-249 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977); *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). That is particularly true in light of the uncontradicted administrative record and the Knutson Declaration establishing that the NEPDG was constituted precisely as the President mandated. Even after the government turned over more than 36,000 pages of

2. Other Principles Of Judicial Review Of Executive Branch Actions Precluded The Constitutionally Problematic Discovery Ordered Below

The court of appeals' analysis also fails to appreciate the significance of Congress's decision not to include in FACA a private cause of action to enforce its requirements. As a result, an action to enforce FACA can proceed in the ordinary case only as an APA action. But, as the district court recognized, neither the President nor Vice President is subject to the APA. Pet. App. 73a-78a; see *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (holding, in light of APA's silence on whether President was within scope of the statute, that President was not covered, "[o]ut of respect for the separation of powers"). Instead, this case proceeded on the assumption that mandamus might be available against the Vice President. See Pet. App. 96a-97a.

That assumption is fundamentally mistaken. When a statute, such as FACA or the APA, does not provide for a cause of action, this Court has carefully limited the available relief. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002) (where no private right of action existed directly under the Family Educational Rights and Privacy Act of 1974, plaintiff could not look to 42 U.S.C. 1983 to supply a cause of action absent an "unambiguously conferred right"); cf. *Starbuck* v. *City & County of San Francisco*, 556 F.2d 450, 459 n.18 (9th Cir. 1977) (holding that mandamus does not "provide an independent ground for jurisdiction" where

documents related to the NEPDG through discovery in this case, respondents have pointed to no evidence to substantiate their baseless assertion that non-governmental persons participated as members of the NEPDG. To the contrary, as the record amply reflects, the President assigned the Vice President and the other members of the NEPDG to fulfill core Executive Branch functions under Article II of the Constitution. In this context, especially, such principles should preclude discovery against the President or Vice President.

plaintiff failed to state a claim under the Raker Act or APA). The terms of the federal mandamus statute, 28 U.S.C. 1361, furnish no basis for the relief respondents seek under FACA.[3]

Moreover, it is clear that mandamus would not lie against the President to force compliance with FACA. Cf. *Franklin*, 505 U.S. at 803-805; *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866). And the President is in many respects the real party in interest here: The President established the NEPDG to assist him in the exercise of his exclusive Article II powers, and it is the process by which he obtains advice from his closest advisors that is threatened by the discovery orders in this case. The limitation on the availability of mandamus actions against the President cannot be evaded merely by naming the Vice President as the party to the action. The same considerations that would preclude a mandamus action against the President in the circumstances of

[3] The federal mandamus statute confers jurisdiction on the district courts over actions in the nature of mandamus to compel an officer of the United States "to perform a duty *owed to the plaintiff*." 28 U.S.C. 1361 (emphasis added); see *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984) (holding that Section 1361 codifies common law writ of mandamus and provides a remedy only if a plaintiff "has exhausted all other avenues of relief and only if the defendant *owes him* a clear nondiscretionary duty") (emphasis added). In adopting that language, Congress expressly rejected proposals to extend Section 1361 to the enforcement of duties owed by government officials to the general public, rather than to an individual plaintiff. See S. Rep. No. 1992, 87th Cong., 2d Sess. 6 (1962); 108 Cong. Rec. 18,783-18,784, 20,079, 20,093-20,094 (1962). That language precludes mandamus in this case. The requirements of FACA in no way establish a "duty owed to the plaintiff" in the sense envisioned by Section 1361. Respondents do not have any personal or individualized "rights" under FACA that could be enforced in a mandamus action. Compare, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 162 (1803); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 543 (1838). They instead are no different than any other member of the public vis-a-vis the information they seek. The text and purposes of Section 1361, therefore, preclude any recognition of mandamus jurisdiction in this case.

this case also would preclude an action against the Vice President.

In any event, even if a mandamus action could be brought against the Vice President (which it cannot), it would not permit the kind of discovery authorized here. To obtain mandamus, plaintiffs must establish a clear right to the relief sought, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 121 (1988) ("The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of a 'clear nondiscretionary duty.'") (quoting *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984)), which respondents plainly cannot do. The complaints in this case fail to allege facts that would establish a clear and indisputable right to mandamus relief. See Pet. App. 32a & n.1, 43a (Randolph, J., dissenting). Rather, at most, they seek to initiate a fishing expedition through discovery to determine whether any statutory rights *might* have been violated.

Indeed, the discovery ordered here would be inappropriate in a normal APA action. As this Court's decisions make clear, judicial review under the APA is generally based on an administrative record, not on discovery. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971). Here, the materials that would constitute the administrative record—consisting of the documents establishing the NEPDG, the NEPDG's Report, the letter of the Vice President's counsel regarding the status of the NEPDG, and the Knutson Declaration—establish that the NEPDG consisted entirely of federal officers or employees. And the complaints in this case, even viewed in respondents' favor, allege no more than episodic, intermittent contacts between individual members of the NEPDG and private parties, J.A. 21-23 (Judicial Watch 2d Amend. Compl. ¶¶ 26-30), to which respondents append conclusory allegations, based on "information and belief," that there were further contacts that rose to the level of de facto membership in

the NEPDG or in some unspecified subgroup, J.A. 21, 3335, 43 (Judicial Watch 2d Amend. Compl. ¶¶ 25, 38); *id.* at 146 (Sierra Club Compl. ¶¶ 18-21). Even under ordinary principles of APA review, therefore, the district court should have denied respondents' claims without ordering discovery.

The district court, however, refused to reject respondents' allegations as a matter of law or to rule on the basis of the administrative record, and, instead, proceeded to order discovery, which would under any circumstances be inappropriate under the APA absent "strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420; *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998).[4]

Such discovery was particularly inappropriate where, as in the case of the Vice President, the APA does not apply. See Pet. App. 39a (Randolph, J., dissenting) (concluding that the NEPDG "was not an administrative agency; it was not required to make findings of fact and conclusions of law in order to enable judicial review under the APA; and the officials the President named to the group [especially the

---

[4] *Overton Park* indicates that in certain circumstances in an APA action a further explanation by the agency may be appropriate to fill in a "gap" in the administrative record. See 401 U.S. at 419-421. But such a gap exists only where the record taken as a whole would not permit review of the agency action under 5 U.S.C. 706. Here, review is not available under Section 706 and, in any event, there is no "gap." Both the President's memorandum establishing the NEPDG and the NEPDG's report speak clearly to the issue of the group's membership, and both confirm that its only members were federal officials. Indeed, any conceivable "gap" stems only from respondents' unsupported allegation that somewhere there is a document that shows that the President was disobeyed and private individuals were somehow permitted to serve as NEPDG members. Such baseless allegations, however, could always be made to suggest a "gap" in any administrative record. Contrary to the court of appeals' suggestion (Pet. App. 11a), even in an APA action, nothing in *Overton Park* suggests that a further explanation by appropriate officials—much less discovery—would be appropriate based on such allegations. See Pet. App. 38a-39a (Randolph, J., dissenting).

Vice President] were not agency officials within the meaning of the APA"). Because neither FACA, nor the APA, nor mandamus, nor any combination thereof provide respondents with a cause of action against the Vice President—or the President, who in the context of this case is in many respects the real party in interest—the lower courts should have dismissed the Vice President from the case.

C. The Expansion Of FACA Adopted Below Violates The Constitutional Doctrine Of Separated Powers

As the discussion above demonstrates, the court of appeals' analysis would transform a statute designed to regulate the establishment of blue-ribbon committees into a general warrant to search Executive Branch groups and committees for contacts with outsiders who might be deemed de facto "members." It would make FACA—which expressly exempts advisory groups made up exclusively of government employees—an intrusive and unconstitutional interference with core Executive Branch functions. For the reasons set forth above, such a construction of FACA should be rejected because it fundamentally misunderstands the statute and would violate the presumption of regularity and other principles of judicial review of Executive actions. Moreover, if any doubt existed on this score, it should be resolved, as in *Public Citizen*, to avoid serious constitutional difficulties. However, if the Court concludes that the statute in fact authorizes the approach adopted below, then it should hold that the application of FACA to the NEPDG is unconstitutional.

1. The NEPDG's Information-Gathering And Policy-Developing Activities For The President Are Within His Exclusive Responsibilities Under Article II And Beyond Congress's Legislative Powers

Article II, section 1 of the Constitution vests "[t]he executive Power" in the President of the United States. In

order to fulfill his Executive duties, the President must be able to consult with his advisors and to obtain their candid guidance and expertise. Both the Opinion Clause and the Recommendations Clause reflect this need and provide specific textual foundations for the President's powers to gather information and develop policy—and both clauses are manifestly not subject to manipulation or interference by Congress.

During the Constitutional Convention of 1787, the Framers considered several times whether to provide the President with some form of advisory council that included representatives of the Legislature or Judiciary. See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 487-488, 509-510, 569, 598-602 (W.W. Norton & Co. 1966) (debates of Aug. 20, 22, and 31 and Sept. 7, 1787). Each such proposal was rejected. The Framers chose instead to enshrine in Article II the President's power to seek advice from those under his direct control. As Alexander Hamilton subsequently explained, the unity of the Executive would be destroyed if the President were "subject[ed] in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him." *The Federalist*, No. 70, at 472-473 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) . The Opinion Clause thus explicitly confirms the President's authority to gather information and opinions from his subordinates. The history of that provision, the structure of Article II, and the obvious constraints of the separation of powers make it clear that the President's authority to receive opinions from Executive officers is not subject to interference from or control by the other Branches. The President may, of course, enlist the Vice President in the process of obtaining those opinions, as Congress has explicitly recognized. See 3 U.S.C. 106.

The Recommendations Clause (along with the State of the Union Clause) provides further textual evidence of the

President's powers to gather information and develop and propose policy. Those clauses expressly contemplate that the President will, "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. The President's duties to inform Congress and to recommend measures for its consideration presuppose that the President "must possess more extensive sources of information * * * than can belong to [C]ongress." Joseph Story, *Commentaries on the Constitution of the United States*, at § 807 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833). Those duties also presuppose, of course, that the President will be able to cultivate his sources of information, and also to develop for himself the "measures" that he will recommend, because the quality of his recommendations will be commensurate with his ability to inform himself and deliberate about them.[5] Most importantly, the Recommendations Clause expressly vests the exercise of those powers in the President's own discretion. Because the President's duty requires him to recommend only what "*he* shall judge necessary and expedient" (U.S. Const. Art II, § 3 (emphasis added)), the Constitution indicates clearly that this exclusively Executive power must remain free from interference. They are the President's recommendations, not the recommendations forced upon him according to some system subject to congressional or judicial control.

Thus, the powers in both the Opinion and Recommendations Clauses are entrusted exclusively to the President

[5] An earlier draft of the Recommendations Clause had referred to "Matters" rather than "Measures." "The greater presidential participation needed to submit 'measures' implicitly presumes that there exist presidential prerogatives of investigation, inquiry, and advocacy by which to formulate and articulate such proposed solutions." J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2084 (1989).

—and are textually committed to his discretion. Congress cannot regulate the exercise of those functions. As this Court explained in *Barenblatt* v. *United States*, 360 U.S. 109 (1959): "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Id.* at 111-112. If Congress cannot "inquire into matters which are within the exclusive province" of the Executive, then, *a fortiori*, it cannot empower the public to force disclosure of such matters. This is true, moreover, without regard to the assertion of a claim of Executive privilege. The Constitution vests no power in Congress to regulate such exclusively Executive functions. For this reason, this Court has consistently refused to tolerate legislative intrusions on the Executive's express powers and duties. See *INS* v. *Chadha*, 462 U.S. 919 (1983) (Presentment Clause); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1871) ("[I]t is clear that the legislature cannot change the effect of * * * a pardon."); *Public Citizen*, 491 U.S. at 482 (Kennedy, J., concurring) (Congress cannot "encroach[] upon a power that the text of the Constitution commits in explicit terms to the President.").

Interference with the President's advice- and information-gathering activities is no less unconstitutional when it affects the exercise of his Recommendations or Opinion Clause authority than when it touches on his power to grant pardons, nominate judges, or have legislation presented for his approval or veto. Indeed, the interference with his Recommendations Clause and Opinion Clause authority is particularly grave because both of those clauses directly implicate the information-gathering and policy-development process itself. Although the Recommendations Clause contemplates the transfer of information to Congress, it expressly leaves to the President the judgment of what measures

warrant recommending as "necessary and expedient." In that sense, the Recommendations Clause is directly analogous to the power to nominate judges and Executive Branch officials. In both cases, a transfer of a proposal to Congress is envisioned, at which point Congress has a constitutionally authorized role. But the process of formulating that proposal is granted exclusively to the President and is beyond Congress's power. Indeed, Congress's ability to address the nominee or recommendation directly renders Congressional intrusion into the pre-nomination or pre-recommendation process unnecessary as well as unconstitutional. As this Court's decision in *Barenblatt* shows, Congress simply lacks authority to inquire into—and by necessary implication to empower anyone with a filing fee to force disclosure of—the NEPDG's activities, because they are "matters * * * within the exclusive province" of the Executive. 360 U.S. at 111-112; see *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) (pardon power "flows from the Constitution * * * and * * * cannot be modified, abridged, or diminished by the Congress"); cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (Congress cannot interfere with Judiciary's power to issue final judgments).

Application of FACA to the NEPDG would violate these separation-of-powers principles in a most direct way. As Judge Buckley observed in his concurring opinion in *AAPS*, "[i]t is hard to imagine conditions better calculated to suppress the 'candid, objective, and even blunt or harsh opinions' that the President [i]s entitled to receive from" those he selects to help develop legislation than the application of FACA's public meeting and disclosure requirements. 997 F.2d at 925 (quoting *Nixon I*, 418 U.S. at 708). The President's charge to the NEPDG puts the group at the very heart of these textually committed powers. The President specifically named to the NEPDG the heads of the Departments of the Treasury, the Interior, Agriculture, Commerce,

Transportation, and Energy, as well as the Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, and other high-ranking presidential advisors. He explicitly sought their views regarding matters relating to their respective agencies, and did so to obtain advice on administrative actions and legislative proposals that he judged necessary and expedient. In fact, the President submitted the NEPDG Report directly to Congress for action by it.

Indeed, even if (contrary to fact) the NEPDG had included non-governmental employees among its members, FACA could still not constitutionally require the NEPDG to disclose the process by which the group developed recommendations for the President. Congress cannot interfere with the development of the President's proposals by requiring disclosure of the advice he solicits in formulating them, even if (as was not the case with the NEPDG) some of the individuals who participate in advising the President come from outside the government. See *AAPS*, 997 F.2d at 925 (Buckley, J., concurring) (application of FACA to President's Task Force on National Health Care Reform, charged with developing legislative proposals, unconstitutional). Indeed, both opinions in *Public Citizen* expressed constitutional concerns with regulating the advice received from an outside group consisting only of non-governmental members. See, *e.g.*, *Public Citizen*, 491 U.S. at 487 (Kennedy, J., concurring) (noting a similar allocation of responsibilities in the Appointments Clause: "The President has the sole responsibility for nominating these officials, and the Senate has the sole responsibility of consenting to the President's choice."). Nothing in the Appointments Clause or the Recommendations Clause limits the President to input from government employees.

Moreover, beyond the ways in which FACA, as construed by the courts below, would interfere with the President's

ability to obtain advice, including from his senior governmental advisors on legislative proposals, FACA would also purport to require the President to make the NEPDG "fairly balanced in terms of the points of view" of its membership and to prohibit "inappropriate[] influence[]" over the group by the President. 5 U.S.C. App. 5(b)(2), (3), and(c), at 3. Plainly, such interference by Congress in the composition of the group selected by the President to provide advice on administrative actions to order and legislation to propose, or on his ability to interact with his senior governmental advisors, would constitute an unconstitutional encroachment by Congress on the President's ability to "accomplish[] [his] constitutionally assigned functions." *Morrison* v. *Olson*, 487 U.S. 654, 695 (1988) (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (*Nixon II*)).

For the reasons set forth above, the Constitution, by its textual commitment of "executive Power" to the President and by the Opinion and Recommendations Clauses, has struck any balance that there is to be struck—the Constitution preserves the zone of autonomy for the President in obtaining advice he seeks to perform his duties. Even if, however, this Court were to determine that the balance was not struck by the Constitution itself, and that weighing the balance is somehow appropriate, it is clear that any such balance would weigh heavily in favor of forbidding the discovery at issue here. Cf. *Morrison*, 487 U.S. at 695; *Nixon II*, 433 U.S. at 443.

As an initial matter, Congress's legitimate interests are non-existent when it comes to investigating the discharge of functions within the exclusive province of another Branch. See *Barenblatt*, 360 U.S. at 111-112. Congress could not validly regulate the process by which the President gathers advice and information to formulate his policies and recommendations, and it has no greater legislative authority to empower private individuals to intrude into that process.

Nor do respondents have any meaningful need for the information that they seek. The discovery process would only confirm that the NEPDG was organized as the President directed and the group itself reported, that FACA does not apply, and that respondents, therefore, are not entitled to any of the information that they seek. Moreover, even if contrary to fact, FACA did apply to the NEPDG, a mere interest in disclosure for its own sake could not remotely counterbalance the extreme interference with core Article II responsibilities authorized by the decisions below.

2. The Decisions Below Cannot Be Reconciled With Public Citizen

The court of appeals' approach is flatly at odds with the approach taken by this Court in *Public Citizen*. At issue in *Public Citizen* was the President's practice of having the Department of Justice seek advice from the Standing Committee on the Federal Judiciary of the American Bar Association (ABA) to assist the President in fulfilling his constitutional duty to nominate and appoint federal judges. The plaintiffs in that case alleged that the ABA consultations were subject to the disclosure and other requirements of FACA because the Executive "utilized" the ABA committee as a non-governmental advisory group.

This Court disagreed. Although it acknowledged that the Executive may have "utilized" the ABA committee "in one common sense of the term," the Court recognized that interpreting the statute to have broad coverage would raise significant separation-of-powers concerns, since "it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice." *Public Citizen*, 491 U.S. at 452; see *id.* at 466-467. As the Court explained, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless

committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Id.* at 453.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, concurred separately.[6] The concurring Justices agreed that "it is quite desirable not to apply FACA to the ABA Committee," but they concluded that "as a matter of fair statutory construction" there was no way to avoid that result. *Public Citizen*, 491 U.S. at 481. Instead, they would have held that application of FACA in the context of that case violated the Constitution's separation of powers. See *id.* at 482 ("The essential feature of the separation-of-powers issue in this suit, and the one that dictates the result, is that this application of the statute encroaches upon a power that the text of the Constitution commits in explicit terms to the President."). The concurring Justices explained that "[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution," as had the President's nomination and appointment power, "the balance already has been struck by the Constitution itself," and the other Branches have no authority to regulate the exercise of that power. *Id.* at 486. Thus, "[t]he mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act." *Id.* at 488-489.

This case involves the same statute and raises the same separation-of-powers concerns involved in *Public Citizen*, and it does so in a context in which the interference with the

[6] Justice Scalia took no part in the decision. *Public Citizen*, 491 U.S. at 467.

role and responsibility of the Executive is far more direct and the construction of the statute that avoids such difficulties is far more obvious. Both opinions in *Public Citizen* make clear that the construction of FACA adopted below is fundamentally flawed. Unlike the Executive's use of the ABA committee in *Public Citizen*, which could be said to be well within the plain terms of the statute, the de facto member doctrine, especially as applied in this case, is plainly inconsistent with FACA's text.

Moreover, the ABA committee in *Public Citizen* concededly involved individuals outside the government and so did not implicate the Opinions Clause. Here, by contrast, the President established a committee of his closest advisors such that the process is protected by the Recommendations Clause, which is analogous to the power at issue in *Public Citizen*, *and* the Opinion Clause, which protects the President's authority to compel advice from his closest government advisors. If the mere assertion of the existence of an unofficial, non-governmental member is enough to trigger discovery obligations roughly co-extensive with the available remedies for a FACA violation, then the textual exemption of advisory groups consisting of only government officials and the requirement that the President must specifically authorize the establishment of a FACA committee—limitations essential to the statute's constitutionality in this context—have little or no practical effect. Thus, the decisions below will routinely generate the kind of intrusions that this Court sought to avoid in *Public Citizen* and other cases. By rejecting the de facto membership doctrine and applying a straightforward interpretation of FACA's text, the Court can avoid those constitutional difficulties. Cf. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992) (holding that absent "an express statement by Congress," Court would not construe the APA's definition of "agency" as an "authority of the Government of the United States" to

include the President); *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that telephone notes made by Henry Kissinger while he was serving as Assistant to the President were not "agency records" under the Freedom of Information Act's broad definition of agency to include "any * * * establishment in the executive branch of the Government (including the Executive Office of the President)").

It is equally clear that if FACA necessarily includes a de facto member doctrine and somehow authorizes wide-ranging discovery despite presumptions in favor of administrative regularity, then application of the statute here would be unconstitutional. See Part I.C.1, *supra*; *Public Citizen*, 491 U.S. at 467-489 (Kennedy, J., concurring). Just like the appointment power at issue in *Public Citizen*, the authority to require opinions from his advisors and to recommend measures to Congress are "power[s] that the text of the Constitution commits in explicit terms to the President." 491 U.S. at 482; see U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. Accordingly, "[t]he mere fact" that FACA, as construed below, "would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his dut[ies] assigned under the Constitution * * * is enough to invalidate the Act." *Public Citizen*, 491 U.S. at 488-489.

II. The Court Of Appeals' Jurisdictional Rulings Conflict With This Court's Cases And Improperly Immunize Serious Separation-Of-Powers Violations From Meaningful Judicial Review

The court of appeals also erred in holding that it lacked mandamus and appellate jurisdiction because the dispute was premature. This case self-evidently involves more than an ordinary discovery dispute. The decisions below impose intrusive and distracting discovery obligations on the Vice

President himself. Moreover, the dispute arises in the context of FACA, in which this Court has recognized the serious separation-of-powers concerns presented by FACA's disclosure obligations. But FACA's disclosure obligations are not meaningfully different from the discovery orders in this case. Indeed, the relatively unbounded inquiry into whether a committee may have had unauthorized, de facto members may result in more disclosure concerning the actions of a committee that is ultimately determined not to be covered by FACA than the disclosure that would be mandated by the statute if it applied. To treat the former as a completely unreviewable order blinks reality and invites abuse. The distraction—not to mention the impediments to candid advice—caused by the discovery orders that will become an inevitable feature of the scheme created by the lower courts will provide ample incentives to file these lawsuits. The outcome of the lawsuits will largely be beside the point, as the remedy for a proven FACA violation is not materially different from a discovery order. The court of appeals' refusal to consider any separation-of-powers objections prior to the assertion of Executive privilege claims is inconsistent with this Court's decision in *Public Citizen*, and would pose an unacceptable barrier to appellate review of separation-of-powers claims that are broader than or antecedent to claims of privilege. Nothing in this Court's case law supports such an illogical result.

Respondent Sierra Club's belated argument that petitioners' separation-of-powers claims are stale (in addition to being premature) is equally flawed. The Sierra Club contends that because petitioners' separation-of-powers arguments have been consistent throughout this litigation, petitioners were somehow obligated to seek appellate review of the district court's partial denial of their motion to dismiss, rather than seek review of the district court's discovery orders. But the district court's unprecedented discovery

orders violate the separation of powers regardless of whether the court should have granted petitioners' motion to dismiss. Indeed, rather than providing a ground for affirming the court of appeals' erroneous jurisdictional holding, the Sierra Club's staleness argument only confirms that petitioners' separation-of-powers arguments are broader than claims of Executive privilege over individual documents and are therefore not rendered premature by the absence of such privilege claims.

A. The Court Of Appeals Had Mandamus Jurisdiction

Contrary to the court of appeals' decision (Pet. App. 13a, 15a), the fact that petitioners have not yet asserted privilege over the documents subject to discovery does not render the separation-of-powers problems associated with those orders either "premature" or "hypothetical." Rather, the sweeping discovery ordered below violates the separation of powers without regard to whether privilege could or would be asserted. That is made clear by this Court's decision in *Public Citizen*. In *Public Citizen*, there was no assertion of Executive privilege, yet the Court, without deciding the issue, acknowledged "the seriousness of the[] constitutional challenge[]" to applying FACA to a private group formed "to render confidential advice with respect to the President's constitutionally specified power to nominate federal judges." 491 U.S. 457, 466-467. Similarly, despite the absence of a privilege claim, the three concurring justices would have held that application of FACA to the ABA committee was unconstitutional because it posed "a direct and real interference with the President's exclusive responsibility to nominate federal judges." *Id.* at 488 (Kennedy, J., concurring). Accordingly, the Court unanimously recognized the serious separation-of-powers concerns raised by FACA, even in the absence of a privilege claim. Cf. *Nader* v. *Baroody*, 396 F. Supp. 1231, 1234 & n.5 (D.D.C. 1975) (holding that fact that

President had not asserted privilege "misses the point" of separation-of-powers concern).[7]

Nor can the Vice President's separation-of-powers objections be adequately addressed by the district court on remand or by appeal after final judgment, because the very essence of those objections is that *any* discovery—let alone discovery tantamount to relief for a violation—in the context of the record in this case would violate the separation of powers. That is so for two reasons. First, petitioners contend that because the exercise of the President's authority under the Opinions and Recommendations Clauses at issue in this case involves powers expressly committed by the Constitution to the Executive, Congress lacks any authority to regulate the President's exercise of those powers. Thus, any application of FACA to the NEPDG—even if only in the form of preliminary discovery to determine whether FACA, by its terms, applies—would constitute an impermissible encroachment by Congress into exclusively Executive functions.

Second, petitioners' objections are not limited to the content of particular documents, but rather relate to the impropriety of ordering intrusive discovery (and thereby requiring assertions of Executive privilege) based solely on unsupported—and, indeed, contradicted—allegations of unauthorized, de facto members. At least until a plaintiff overcomes the constitutionally grounded presumption of regularity that

---

[7] In this regard as well, the disclosure provided by the discovery orders mirrors the relief provided for a violation of the statute. FACA itself preserves the ability of the President or the head of a committee to close meetings to the public, see 5 U.S.C. App. 10(d), at 6, and privilege claims could preserve material from disclosure in a suit filed against a terminated committee. Because the relief ordered below is not materially different from the relief that could be ordered in a final judgment, there is no reason to postpone plenary review until a final judgment issues and every reason not to wait until the constitutional damage is done before taking the steps necessary to prevent it.

applies to all Executive Branch actions (and with particular force to the President and the Vice President), see Part I.B., *supra*, separation-of-powers principles preclude all discovery into the process by which the President received advice in the exercise of his Article II powers, not merely discovery of matters protected by a separate Executive privilege.

Indeed, the panel majority itself recognized that petitioner's separation-of-powers arguments are both broader than and antecedent to any specific future claims of privilege, see Pet. App. 15a (characterizing petitioner's separation-of-powers argument as more like an "immunity" than a privilege), but then failed to recognize the jurisdictional consequence of that observation. As the court of appeals had previously held, an "immunity claim has special characteristics beyond those of ordinary privilege. The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

Contrary to the court of appeals' decision, moreover, a President should not be forced to conduct an extensive—and distracting—line-by-line review of materials related to the advice he received from his closest advisors and assert privilege claims as a defense against improper or overly broad discovery. Requiring such claims of Executive privilege itself implicates important separation-of-powers concerns. As the district court explained in *United States* v. *Poindexter*, 727 F. Supp. 1501, 1509 (D.D.C. 1989), "the constitutional clash which would be precipitated by an invocation of executive privilege should be avoided if that may reasonably be done." Accordingly, the court in *Poindexter* held that it was inappropriate to require the President even to "consider the privilege question" until after other means were taken to limit and narrow discovery, thereby limiting interference

with the Executive's other activities. *Id.* at 1504. In contrast, the courts below treated claims of Executive privilege as the Executive's first, and only, line of defense against improper discovery. That approach turns traditional separation-of-powers concerns on their head, and would eliminate the Executive's ability to obtain appellate review of separation-of-powers claims that are distinct from privilege claims, unless and until privilege is invoked. Such a requirement has no basis in law or logic and would erect an enormous obstacle to vindicating the proper functioning of the separation of powers.

B. The Court Of Appeals Had Appellate Jurisdiction

For similar reasons, the court of appeals' denial of jurisdiction over the Vice President's appeal and its attempt to distinguish this Court's decision in *United States* v. *Nixon*, 418 U.S. 683 (1974) (*Nixon I*) are also mistaken. The majority's reading of *Nixon I* as requiring the assertion of a privilege claim before an appeal may be permitted (Pet. App. 24a-25a) is illogical. Where, as here, the separation-of-powers arguments do not take the form of—and are logically antecedent to—a privilege claim, it serves no purpose to require the President or Vice President to assert privilege claims before permitting an interlocutory appeal.

In any event, *Nixon I* did not turn on the assertion of privilege, but on separation-of-powers concerns raised by forcing the President to submit to contempt proceedings merely to facilitate timely review. This Court held that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate" in a case involving the President. 418 U.S. at 691. "To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two

branches of the Government." *Id.* at 691-692. Moreover, the Court held, "a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review." *Id.* at 692. Those same considerations support permitting an appeal here by the Vice President, especially where, as here, the Vice President acted in aid of the President, who established the NEPDG, is the ultimate custodian of its records, and would surely have a right to appeal under 28 U.S.C. 1291. Cf. *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (citing *Nixon I* and stating that "[m]andamus has been recognized as an appropriate shortcut when holding a litigant in contempt would be problematic").

The court of appeals did not question that the unique role of the Vice President under the Constitution places him within the *Nixon* exception to the contempt requirement, but the court of appeals (wrongly, in petitioners' view) nevertheless concluded that invocation of privilege with respect to particular documents is a prerequisite to such an appeal. Under the court of appeals' approach, the only way that the Vice President can obtain appellate review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery on remand, submit to the indignity of a contempt citation, and appeal the contempt citation. Such an approach—particularly in a case such as this where the President is in many respects the real party in interest—is clearly inconsistent with *Nixon*.

C. Petitioners' Separation-Of-Powers Claims Are Not Stale

The Sierra Club argues, for the first time in its brief in opposition to certiorari, that the court of appeals lacked jurisdiction because petitioners' separation-of-powers claims were not only premature, but stale. It contends that because petitioners' separation-of-powers arguments throughout this litigation have been essentially the same—namely, that in

the circumstances of this case, the legislative and judicial powers cannot extend to compelling a Vice President to disclose to private litigants the details of the process by which a President obtains information and advice from the Vice President and other senior presidential advisors—petitioners were required to seek appellate review of the district court's denial of their motion to dismiss, rather than waiting to challenge subsequent discovery orders on related constitutional grounds.

That contention is meritless. Petitioners' argument in their motion to dismiss that application of FACA's disclosure requirements would violate fundamental separation-of-powers principles does not preclude them from arguing—either in the district court or in the court of appeals on mandamus or appellate review—that discovery orders requiring even more disclosure than the statute itself based on a mere allegation, as opposed to an adjudication, of unauthorized de facto members violates the separation of powers, *a fortiori*. The district court's unprecedented discovery orders violate the Constitution's separation of powers, without regard to whether the court should have granted petitioners' motion to dismiss. And it was those discovery orders—not the denial of the motion to dismiss—that gave rise to the need for immediate mandamus and appellate review by the court of appeals. Indeed, petitioners contended below, after denial of the motion to dismiss, that the district court could resolve this case on the merits based on the available administrative record, without any discovery. See Pet. 18-20.

While meritless, the Sierra Club's misplaced staleness argument does serve to demonstrate the folly of respondents' prematurity arguments. It makes clear, for example, that petitioners' separation-of-powers arguments are broader than claims of privilege to individual documents, and instead are more in the nature of a claim of immunity from discovery, at least where the plaintiff fails to overcome the

well-established presumption of regularity afforded to Executive Branch actions. See, *e.g.*, Sierra Club Br. in Opp. 11 (acknowledging that petitioners have consistently argued that they "have a constitutional right not to submit to any discovery in cases of this kind, presumably on some kind of immunity theory").

The staleness argument also makes clear that the questions presented in the petition for certiorari were fully raised below. See Sierra Club Br. in Opp. 11 (petitioners' discovery objections in district court "were identical to the ones that they had previously raised—no discovery was proper and the burden of even having to respond with specific claims of privilege would violate principles of separation of powers"); *ibid.* ("the basis of the Government's claims never changed —no discovery is permitted in this case"). As Judge Randolph observed in his dissenting opinion, "the federal officers have repeatedly argued before the district court and this court that the discovery, as permitted by *AAPS*, violates the separation of powers. * * * The problem here is not that the defendants failed to make the arguments. The problem is that the majority failed to answer them." Pet. App. 42a n.5.[8]

In this case, federal agencies have produced tens of thousands of pages of materials in response to respondents' discovery requests. Petitioners, however, have resisted dis-

[8] Citing *AAPS*'s de facto membership doctrine, the Sierra Club asserts that "when these complaints were filed, the law was clear in the District of Columbia Circuit that the formal membership of an advisory committee [was] not conclusive on the applicability of FACA's exemption for committees composed entirely of federal officials." Br. in Opp. 2. It is therefore odd that on the next page of its brief in opposition, it faults petitioners for allegedly failing to "attack the continued validity of *AAPS*" in the lower courts. *Id.* at 3. In fact, petitioners argued below that *Public Citizen*, rather than *AAPS*, provides the appropriate constitutional standard and that *AAPS* was wrongly decided. See, *e.g.*, 3/8/02 Mem. in Support of Mot. to Dismiss at 18-23.

covery against the Vice President and the President's immediate subordinates into the President's exercise of powers committed exclusively to the President by Article II of the Constitution, including the Opinion and Recommendations Clauses. Because the very essence of petitioners' separation-of-powers objections is that *any* discovery against the Vice President and immediate assistants to the President—let alone discovery tantamount to relief for a proven FACA violation—in the context of the record in this case would violate the separation of powers, petitioners' arguments are neither premature nor stale. Accordingly, the court of appeals' jurisdictional holding should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. KATSAS
SHANNEN W. COFFIN
Deputy Assistant Attorneys General
DAVID B. SALMONS
Assistant to the Solicitor General
MARK B. STERN
MICHAEL S. RAAB
DOUGLAS HALLWARD-DRIEMEIER
Attorneys

FEBRUARY 2004

Supreme Court, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

(10)

No. 03-475

IN THE

Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT
OF THE UNITED STATES, ET AL.,
Petitioners

v.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT JUDICIAL WATCH, INC.

Paul J. Orfanedes*
James F. Peterson
Michael J. Hurley
JUDICIAL WATCH, INC.
501 School Street, S.W., Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Respondent Judicial Watch, Inc.
* Denotes Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals correctly denied Petitioners' request for mandamus relief and attempted interlocutory appeal concerning a non-appealable, non-final discovery ruling.

2. Whether this Court should adopt a construction of the Federal Advisory Committee Act that is at odds with the plain language of the statute and overturn the lower courts' efforts to postpone, if not avoid, addressing the constitutionality of the statute by authorizing narrow, carefully focused discovery.

3. Whether this Court should declare the Federal Advisory Committee Act unconstitutional as applied to the National Energy Policy Development Group.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. The National Energy Policy Development Group 2

B. The Litigation Below 3

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. Following Long-Standing Doctrine, The Lower Courts Properly Authorized Narrow, Carefully Focused Discovery 12

A. The Lower Courts Properly Sought To Postpone, If Not Avoid, Consideration Of Any Constitutional Issues By Authorizing Very Limited Discovery 13

B. The Court of Appeals Properly Rejected Petitioners' Request For Mandamus Relief And Dismissed The Vice President's Appeal 21

Page

C. Petitioners' Ancillary Arguments Regarding The Lower Courts' Rulings Lack Merit 26

II. The Lower Courts' Application Of FACA Was Consistent With The Plain Language Of The Statute 29

III. FACA Does Not Violate The Constitution As Applied To The NEPDG 39

CONCLUSION 50

TABLE OF AUTHORITIES

Cases: Page

Alexander v. FBI, 194 F.R.D. 299 (D.D.C. 2000) 20

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 21, 22

American Foreign Serv. Ass'n v. Garfinkle, 490 U.S. 153 (1989) 14, 15

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936) 39

Association of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) ..... *passim*

Barenblatt v. United States, 360 U.S. 109 (1959) 45

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 28

Buckley v. Valeo, 424 U.S. 1 (1976) 19

Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) 28

Church of Scientology v. United States, 506 U.S. 9 (1992) 25

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 29

Page

Clinton v. Jones, 520 U.S. 681 (1997) 19, 20, 27

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 91 (1973) 40

Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1 (D.C. Cir. 1998) 29

Conley v. Gibson, 355 U.S. 41 (1957) 14

Crawford-El v. Britton, 523 U.S. 574 (1998) 14

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 31

Franklin v. Massachusetts, 505 U.S. 788 (1992) 27

Fullilove v. Klutznick, 448 U.S. 472 (1980) 39, 40

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 19

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 31

Hickman v. Taylor, 329 U.S. 495 (1947) 29

INS v. Chadha, 462 U.S. 919 (1983) 45

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) ... 20, 21

Page

Kerr v. United States Dist. Court, 426 U.S. 394 (1976) 21, 22

Leatherman v. Tarrant County, 507 U.S. 163 (1993) ... 14

Leedom v. Kyne, 358 U.S. 184 (1958) 28

Minneapolis Star & Tribune Co. v. Minnesota Commn'r of Revenue, 460 U.S. 575 (1983) 48

Mistretta v. United States, 488 U.S. 361 (1989) 19

Morrison v. Olson, 487 U.S. 654 (1988) ..... *passim*

Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975) ... 47

National Ass'n of Criminal Def. Lawyers, Inc. v. U.S. Dep't of Justice, 182 F.3d 981 (D.C. Cir. 1999) 23

Natural Resources Def. Council v. Curtis, 189 F.R.D. 4 (D.D.C. 1999) 20

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) ..... *passim*

Public Citizen v. Department of Justice, 491 U.S. 440 (1989) ..... *passim*

Rostker v. Goldberg, 453 U.S. 47 (1981) 39

Page

Spector Motor Service v. McLaughlin,
323 U.S. 101 (1944) 14, 15

United States v. Armstrong, 534 U.S. 456 (1996) 27

United States v. Klein, 80 U.S. (13 Wall.) 128
(1872) 45

United States v. National Dairy Products Corp.,
372 U.S. 29 (1963) 40

United States v. Nixon, 418 U.S. 683 (1974) ..... *passim*

United States v. Poindexter, 727 F. Supp. 1501
(D.D.C. 1989) 23, 24, 25

Will v. United States, 389 U.S. 90 (1967) 21

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) ..... *passim*

Constitution, Statutes and Rules:

U.S. Const. art. I, § 1 46

U.S. Const. art. II, § 2 40

U.S. Const. art. II, § 3 40

Page

Federal Advisory Committee Act,
5 U.S.C. App. 1, *et seq* 2

5 U.S.C. App. 2 36

5 U.S.C. App. 2(10)(b) 17

5 U.S.C. App. 2(b)(5) 2

5 U.S.C. App. 3(2) 3, 31, 32, 33

5 U.S.C. App. 3(2)(B) 30, 36

5 U.S.C. App. 3(2)(C) 46

5 U.S.C. App. 9(a) 33, 34, 35

5 U.S.C. App. 9(c) 35

5 U.S.C. App. 10(a)(1) 48

Freedom of Information Act
5 U.S.C. § 552 ..... 2, 44

The Privacy Act, 5 U.S.C. § 552a 44

Government in the Sunshine Act,
5 U.S.C. § 552b 44

Administrative Procedure Act,
5 U.S.C. § 701, *et seq.* 5

Page

13 U.S.C. §§ 8-9 44

26 U.S.C. § 6103 44

28 U.S.C. § 1291 25

28 U.S.C. § 1292(b) 7

Federal Records Act,
44 U.S.C. § 2101, *et seq* 44

Fed.R.Civ.P. 8(a) 14

Fed.R.Civ.P. 37 26

Miscellaneous:

37 Weekly Comp. Pres. Doc. 988 2

Charles W. Johnson, Parliamentarian of the U.S. House of Representatives, *How Our Laws Are Made*, § 7 (2003), at http://thomas.loc.gov 46

Ron Suskind, *The Price of Loyalty* (2004) 4

NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* (2001) 2

STATEMENT

This case comes before the Court on the denial of a motion for a protective order seeking to preclude all discovery. Rather than assert any objections or privileges in response to Respondents' discovery requests, Petitioners instead seek to immunize themselves from any discovery in this case by arguing that the district court's denial of their discovery motion provides a basis to challenge to the constitutionality of the Federal Advisory Committee Act ("FACA"). Following the long-standing precedent of this Court, the district court assiduously sought to postpone, if not avoid, consideration of any constitutional issue by authorizing "very tightly-reined" discovery. The court of appeals, which properly rejected Petitioners' request for mandamus relief and dismissed Petitioners' attempted interlocutory appeal of the district court's discovery order, carefully narrowed discovery even further to avoid reaching any constitutional issue. Nonetheless, Petitioners ask this Court to reject the lower courts' authorization of limited discovery as a means of constitutional avoidance and instead adopt a construction of FACA that is at odds with the plain language of the statute. In the alternative, they ask the Court to declare FACA unconstitutional based on a legal analysis that a majority of this Court has never adopted. The Court should decline Petitioners' invitation to prematurely and unnecessarily decide the constitutionality of FACA at this time solely on the lowers courts' well-considered, non-appealable discovery rulings. The ruling of the court of appeals should be affirmed, and this case should be remanded to the district court for discovery.

A. The National Energy Policy Development Group.

By memorandum dated January 29, 2001, President Bush established the National Energy Policy Development Group ("NEPDG") "to develop a national energy policy designed to help the private sector, and as necessary and appropriate, Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." J.A. 157. The President directed Vice President Richard B. Cheney to lead the group. J.A. 157. Various cabinet and other high-level Executive Branch officials were named as members. *Id.* Andrew Lundquist was made Executive Director. J.A. 143.

After several months of deliberations, on May 16, 2001, the NEPDG submitted a report and recommendations to the President. NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* at ii (2001). The NEPDG published its report and recommendations, with the approval of the President, on or about that same date. On June 28, 2001, President Bush transmitted the NEPDG's report and recommendations to Congress. 37 Weekly Comp. Pres. Doc. 988.

On June 25, 2001, Respondent Judicial Watch, Inc. ("Judicial Watch") sent a letter to Vice President Cheney, pursuant to the Freedom of Information Act ("FOIA") and FACA,[1] 5 U.S.C. § 552 and App. 1, *et seq.*, requesting copies

[1] FACA was enacted by Congress and signed by President Nixon in 1972 to ensure that "Congress and the public [are] kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees," among other purposes. 5 U.S.C. App. 2(b)(5).

of all minutes and final decision documents of NEPDG meetings, as well as a complete listing of all persons and entities that participated in NEPDG meetings. J.A. 30-31. Judicial Watch also asked to attend any future meetings of the NEPDG and requested contact information and a schedule for such meetings. J.A. 31. On July 5, 2001, Judicial Watch's request was denied. *Id.*

B. The Litigation Below.

On July 16, 2001, Judicial Watch filed suit in the U.S. District Court for the District of Columbia under both FOIA and FACA, among other applicable statutes. J.A. 1, 16-138. In its pleadings, Judicial Watch alleged, on information and belief, that private executives and lobbyists representing the energy industry "regularly attended and fully participated" in non-public meetings of the NEPDG "as if they were members" of the advisory committee.[2] J.A. 21. Judicial Watch's Complaint was based in large part on the decision of the U.S. Court of Appeals for the District of Columbia in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993), which had held that persons may be considered members of an advisory committee if their "involvement and role are functionally indistinguishable from those of other members." In support of its allegations, Judicial Watch cited media reports of meetings between the Vice President, the NEPDG's

[2] Under FACA, the definition of an advisory committee includes both advisory groups and any subgroups. 5 U.S.C. App. 3(2). Judicial Watch's pleadings also reference both the NEPDG and subgroups of the NEPDG. J.A. 37-38. For the sake of convenience, in this brief Judicial Watch will refer to the NEPDG only, but that term should be read to include both the NEPDG and its subgroups.

Executive Director, Andrew Lundquist, and energy industry executives and lobbyists. J.A. 21-23. Judicial Watch also cited a letter from the Vice President's counsel, David S. Addington, to members of Congress admitting that NEPDG staff members "met with many individuals who were not federal employees" and a General Accounting Office report specifically finding that the NEPDG had met with "selected non-governmental parties" in its efforts to develop a proposed national energy policy.[3] J.A. 23, 27.

Having been denied access to the information it requested, Judicial Watch's Complaint sought, *inter alia*, a judgment

---

[3] In a recent book, former Treasury Secretary Paul O'Neill, a member of the NEPDG, described the task force as consisting of "only government employees" because Vice President Cheney wanted to avoid the disclosure requirements of FACA. However, O'Neill also confirmed the significant involvement of non-federal employees in the NEPDG:

> Not that other voices didn't join in the conversation. Industry representatives -- in bureaucratic language, the "nonfederal stakeholders" -- were just outside the door. Before and after the formal task force meetings, principals and staff, often moving in small, interdepartmental groups, would meet with lobbyists from all the major energy concerns. For the most part, environmentalists were nowhere to be seen.

O'Neill further described Energy Secretary and NEPDG member Spencer Abraham meeting with "corporations and trade groups . . . each of which delivered policy recommendations and detailed reports." According to O'Neill, Vice President Cheney "met with Enron chairman Kenneth Lay" and received "detailed policy recommendations" from two industry groups. O'Neill also identified Interior Secretary Gail Norton and Environmental Protection Agency Administrator Christie Todd Whitman, both of whom were NEPDG members, as having met with industry executives. Ron Suskind, *The Price of Loyalty* 146 (2004).

declaring Defendants to be in violation of FACA, a writ of mandamus ordering Defendants to comply with FACA, and an injunction requiring release of "detailed minutes of each meeting of Defendant NEPDG . . . that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by Defendant NEPDG." J.A. 39. On January 25, 2002, Respondent Sierra Club filed a similar lawsuit in the U.S. District Court for the Northern District of California. The Sierra Club's lawsuit subsequently was transferred to the U.S. District Court for the District of Columbia and consolidated with Judicial Watch's lawsuit.

Petitioners moved to dismiss Respondents' claims, arguing that "application of FACA to the NEPDG's operations would directly interfere with the President's express constitutional authority" and that "such an expansive reading of FACA would encroach upon the President's constitutionally protected interest in receiving confidential advice from his chosen advisers, an interest that is also rooted in the principle of separation of powers." Pet. App. 4a-5a.

On July 11, 2002, the district court granted in part and denied in part Petitioners' motion to dismiss. Pet. App. 53a-123a. It granted the motion with respect to claims Respondents had asserted against the NEPDG and the Vice President under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, finding that neither the NEPDG nor the Vice President were "agencies" within the meaning of the APA. Pet. App. 77a-79a; 122a-23a. It denied the motion with respect to Respondents' mandamus claim, finding that FACA "leaves no room for discretion" with respect to an advisory committee's obligation to make its records available

for public inspection. Pet. App. 94a-95a. The district court also appropriately deferred any ruling on Petitioners' separation of powers argument, explaining that, "after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA [to the Vice President]." *Id.* at 119a. The district court was fully cognizant that, "while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here." *Id.* The district court also ordered Respondents to submit a joint, proposed discovery plan. *Id.* at 123a.

On August 2, 2002, the district court approved a discovery plan submitted by Respondents and ordered Petitioners to "file detailed and precise objections to particular requests" or "identify and explain their invocations of privilege with particularity." Pet. App. 5a. That same day, Respondents served a single set of interrogatories and a single set of document requests, consisting of nine interrogatories and eight document requests each, on Petitioners. J.A. 215-30. Importantly, Respondents' discovery requests were not directed to the President. *Id.* Nor were they directed to the Vice President individually. *Id.* Rather, Respondents' discovery requests were directed to Petitioners as a whole, including all members of the NEPDG and Executive Director Lundquist. *Id.*

In response, Petitioners declined to serve particularized objections or assert any claims of privilege. Instead, they filed a motion for a protective order and a motion for reconsideration of the district court's August 2, 2002 order

approving Respondents' discovery plan. They also submitted an affidavit by a member of the Vice President's staff, Ms. Karen Knutson, and "urged" the district court to consider, but did not file, a motion for summary judgment. *See* Pet. Br. 6; J.A. 235-41. Ms. Knutson's affidavit asserted that, "[t]o the best of my knowledge . . . no one other than [federal officers and employees] attended any of the [NEPDG] meetings." J.A. 240. Ms. Knutson also claimed to have been present at most of the meetings of the NEPDG, but not at meetings of subgroups of the NEPDG. J.A. 238-39.

On October 17, 2002, the district court denied Petitioners' motion for a protective order and for reconsideration. The district court also directed Petitioners to "produce non-privileged documents and a privilege log" by November 5, 2002. Pet. App. 6a. At a hearing that same day, the district court offered to review allegedly privileged materials *in camera* or appoint a special master to review any privilege claims. J.A. 247.

Instead of responding to the discovery requests and filing a privilege log (or even taking up the district court on its offer to review allegedly privileged information *in camera* or appoint a special master), on October 21, 2002, Petitioners requested a stay pending appeal, and, on October 23, 2002, filed a motion in the district court seeking certification of an interlocutory appeal under 28 U.S.C. § 1292(b). J.A. 368-82. The specific orders Petitioners sought to have certified for interlocutory appeal were as follows: (1) the district court's October 17, 2002 order denying Petitioners' motion for a protective order and for reconsideration of the district court's August 2, 2002 order approving Respondents' discovery plan; (2) the district court's September 9, 2002 order setting a

briefing schedule on discovery motions; and (3) the district court's July 11, 2002 ruling denying Petitioners' motion to dismiss. J.A. 279-81.

On November 7, 2002, while Petitioners' motion for certification of an interlocutory appeal was pending,[4] Vice President Cheney filed a notice of appeal from the following non-appealable, non-final orders entered by the district court: (1) the September 9, 2002 order setting a briefing schedule; (2) the October 17, 2002 order denying Petitioners' motion for a protective order and for reconsideration; and (3) a November 1, 2002 order entered by the district court denying Petitioners' motion for a stay pending appeal. J.A. 337-38.

On or about November 12, 2002, Petitioners filed an emergency motion for a writ of mandamus in the court of appeals challenging the district court's discovery orders. In their petition, Petitioners requested an order "vacat[ing] the discovery orders issued by the district court, direct[ing] the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct[ing] that the Vice President be dismissed as a defendant." J.A. 364-65.

The court of appeals properly rejected the petition for a writ of mandamus and granted Respondents' motion to dismiss the Vice President's appeal. In so ruling, the court of appeals found that Petitioners failed to satisfy the "heavy burden" required to justify the extraordinary remedy of mandamus. Pet. App. 19a. The panel majority unsurprisingly

---

[4] The district court denied Petitioners' motion for certification of an interlocutory appeal on November 26, 2002. J.A. 383-413.

concluded that the district court's legal rulings could be fully considered on appeal following a final judgment and that Petitioners' speculative claims of harm could be fully prevented in the district court through "narrow, carefully focused discovery." *Id.* The court of appeals further held:

> Either the Vice President will have no need to claim privilege, or, if he does, then the district court's express willingness to entertain privilege claims and to review allegedly privileged documents in camera will prevent any harm. Moreover, such measures will enable the district court to resolve the statutory question -- whether FACA applies to the NEPDG -- without "sweeping intrusions into the Presidency and Vice Presidency." And, if after limited discovery, it turns out that no non-federal personnel participated as de facto NEPDG members, the district court will never have to face the serious constitutional issue lurking in this case -- whether FACA can be constitutionally applied to the President and Vice President.

Id. (citation omitted). In dismissing the Vice President's appeal, the court of appeals concluded that the collateral order doctrine did not apply, nor did *United States v. Nixon*, 418 U.S. 683 (1974) ("*Nixon I*"), the only authority relied on by the Vice President:

> Because the Vice President has yet to invoke executive privilege, we are not confronted with the "unseemly" prospect of forcing him to choose between either (1) disclosing allegedly privileged information and appealing following final judgment

> after the "cat is out of the bag," or (2) refusing to disclose and going into criminal contempt in order to create an appealable order. Absent this constitutionally troubling choice, *Nixon* is inapplicable.

Id. 24a-25a.

On September 10, 2003, the court of appeals denied a petition for rehearing filed by Petitioners, and, on December 15, 2003, this Court granted certiorari.

SUMMARY OF ARGUMENT

The courts below properly authorized limited discovery in order to postpone, if not avoid, significant constitutional issues. Petitioners refused to comply with the discovery ordered below, asserting an unprecedented claim to immunity from even having to invoke executive privilege in response to an entirely proper discovery request. Petitioners' subsequent request to the court of appeals for mandamus relief and the interlocutory appeal by the Vice President were properly rejected. Having ignored critical procedural and jurisdictional requirements, Petitioners now request that the Court either (1) interpret FACA in such narrow way that it would be virtually meaningless, or (2) find FACA unconstitutional as applied to Presidential advisory committees. The Court, however, need not even reach these issues, as the decisions below were entirely proper.

(a) The lower courts authorized "very tightly-reined" discovery in order to avoid, or at least postpone, consideration of significant constitutional issues. The district court correctly reasoned that narrowly focused discovery into a key

factual issue -- whether outside private, non-governmental parties participated in the NEPDG, and, if so, to what extent -- might obviate the need for consideration of Petitioners' separation of powers claim. The "very tightly-reined" discovery ordered by the district court was fully consistent with binding circuit precedent, *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), and subsequently was affirmed -- and narrowed further -- by the court of appeals. Contrary to Petitioners' exaggerated claims, the discovery is neither intrusive nor burdensome on the Executive Branch.

In addition, Petitioners' argument -- seeking to immunize the Executive Branch from any discovery without even having to raise particularized objections or assert privileges -- is unprecedented. The court of appeals properly rejected this startling bid for effective immunity from judicial process, noting that Petitioners have not suffered any cognizable harm and that a final order has not been entered. Moreover, and unlike in *United States v. Nixon*, 418 U.S. 683 (1974), no significant likelihood exists that the Vice President will be held in contempt. In short, Petitioners offer no sufficient reason why normal rules of discovery and justiciability are not applicable in this case.

(b) Petitioners' interpretation of FACA, that an advisory committee exists only as "established," is inconsistent with the plain language of the statute and would render FACA meaningless. FACA includes committees either "established" *or* "utilized" by the President. Petitioners' highly restrictive interpretation of FACA, under which a committee could consist only of those members formally designated when the committee was established, would ignore the operational

reality of a committee and eviscerate the purpose of the statute. If private, non-governmental parties participate in a committee after the committee is established, and the committee is subsequently "utilized" by the President, then it is clearly within the ambit of the statute. Petitioners' argument is not only inconsistent with the plain language of the statute, but it would make any violation of FACA unreviewable.

(c) Like their argument regarding discovery, Petitioners' argument regarding the constitutionality of FACA is unprecedented. No majority opinion of this Court has ever adopted the "bright-line" test advocated by Petitioners. Rather, for more than thirty years, the Court has applied a balancing test to separation of powers issues. The powers under the Recommendations and Opinion Clauses are not exclusive, core powers of the Executive Branch, and nothing in FACA prevents the President from exercising any of his constitutionally assigned functions. Any purported intrusion by FACA on Presidential power is *de minimis*, and is more than outweighed by the important objectives of the statute. In any event, the Court need not reach this constitutional issue.

ARGUMENT

I. Following Long-Standing Doctrine, The Lower Courts Properly Authorized Narrow, Carefully Focused Discovery.

In order to postpone, if not avoid, consideration of FACA's constitutionality, the district court ordered very limited discovery rather than adopt a construction of FACA that not only would be at odds with the plain meaning of the

statute, but also contrary to binding circuit court precedent. Petitioners nonetheless challenged the district court's discovery ruling by filing a petition for writ of mandamus and taking an interlocutory appeal. The court of appeals properly rejected Petitioners' petition for writ of mandamus and attempted interlocutory appeal and narrowed discovery even further, again as a means of constitutional avoidance.

Not satisfied with this result, Petitioners urge this Court to adopt a construction of FACA that is at odds with the plain meaning of the statute or, alternatively, to declare FACA unconstitutional entirely. In a futile attempt to infuse the appearance of validity into their unprecedented arguments, they also raise a host of arguments not directly related to the relief they seek. They argue, for instance, that a "presumption of regularity" prevents Respondents from challenging the operations of the NEPDG, that mandamus relief is not available to Respondents, and that the parties and the courts should be limited to considering the administrative record in reviewing Respondents' claims. These ancillary arguments are unavailing to Petitioners, as they lack merit individually and collectively.

A. The Lower Courts Properly Sought To Postpone, If Not Avoid, Consideration Of Any Constitutional Issues By Authorizing Very Limited Discovery.

Before authorizing any discovery, the district court applied ordinary rules of notice pleading and standard rules of procedure, as well as binding circuit precedent, in allowing Respondents' claims to proceed. There is no "heightened" pleading standard for FACA claims under the Federal Rules

of Civil Procedure, nor would the application of any such "heightened"pleading standard have been appropriate. Fed.R.Civ.P. 8(a); *see Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County*, 507 U.S. 163 (1993). Because Judicial Watch alleged that non-federal employees "regularly attended and fully participated" in non-public meetings of the NEPDG "as if they were members of the advisory committee" (J.A. 21), the district court was required to treat those well-pled allegations as if they were true. *Conley v. Gibson*, 355 U.S. 41, 48 (1957). It also was required to draw all reasonable inferences in favor of Judicial Watch. *Id.* Under *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) ("*AAPS*"), Judicial Watch's allegations plainly stated a claim for relief.

Relying on the well-established doctrine of constitutional avoidance, the district court declined to address Petitioners' constitutional claim, *i.e.*, that FACA is unconstitutional as applied to the NEPDG. Pet. App. 98a-99a; *Spector Motor Service v. McLaughlin*, 323 U.S. 101,105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam) (constitutional avoidance especially applicable when relative authority of Congress and the Executive Branch are at issue). The district court explained that, in order to avoid the constitutional issues, it was ordering "very tightly-reined discovery" for three reasons.

First, after discovery, according to the district court, Petitioners may "prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committees at issue." Pet. App. 100a. Such a finding, of course, would render Petitioners' constitutional claim moot. Second, the district court stated that, if it were required to apply a constitutional balancing test under this Court's precedent, *e.g.*, *Nixon I* and *Morrison v. Olson*, 487 U.S. 654 (1988), it would require additional facts regarding the NEPDG -- *e.g.*, who participated in the NEPDG and to what extent -- in order to assess any intrusion on Executive power. Pet. App. 115a. The district court also reasoned that, if the NEPDG's subgroups in particular were far removed from the President, then any constitutional concerns would be diminished. *Id.* Third, any constitutional issue resulting from a particular discovery request and the subsequent assertion of executive privilege would be, according to the district court, much less "broad" than the Petitioners' overall constitutional challenge to the application of FACA to the NEPDG. Pet. App. 118a-119a. By ordering discovery on narrow factual issues, the district court properly pursued the course of action that best minimized consideration of constitutional issues. *Spector Motor Service*, 323 U.S. at 105; *American Foreign Serv. Ass'n*, 490 U.S. at 161.

In authorizing limited discovery to postpone, if not avoid, consideration of a significant constitutional question, the district court also appropriately relied on *AAPS*, which concerned a similar question of whether outside consultants "may still be properly described as member[s] of an advisory committee if [their] involvement and role are functionally indistinguishable from those of the other members." Pet.

App. 12a. To resolve this factual question, the court of appeals in *AAPS* held that limited discovery was appropriate. *AAPS*, 997 F.2d at 916. Counseled by *AAPS* and the doctrine of constitutional avoidance, the district court authorized "very tightly-reined" discovery consisting of a mere nine interrogatories and eight document requests.

The court of appeals affirmed the district court's discovery order, but narrowed discovery even further, declaring:

> [P]laintiffs have no need for the names of "all . . . persons" who participated in the Task Force's activities, nor "a description of [each] person's role in the activities of the Task Force." *They must discover only whether non-federal officials participated, and if so, to what extent.* Nor do plaintiffs require "all documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force." Rather *they need only documents referring to the involvement of non-federal officials* . . . [W]e are confident that the district court, whose pending discovery order invites petitioners to file "objections," will, consistent with the judiciary's responsibility to police the separation of powers in litigation involving the executive, respond to petitioners' concern and narrow the discovery to ensure plaintiffs obtain no more than they need to prove their case.

Pet. App. 17a-18a (emphasis added). In their efforts to effectively rewrite FACA, if not have the statute declared unconstitutional as applied to the NEPDG in order to

immunize themselves from discovery, Petitioners make no reference to the court of appeals' additional limitations on the scope of discovery.

In addition, and contrary to Petitioners' exaggerated and overstated claims, the district court's discovery order, as further narrowed by the court of appeals, is far from being the equivalent of the relief to which Respondents would be entitled if they ultimately were to prevail under FACA. As described above, the discovery ordered below is limited to establishing "*whether non-federal officials participated in [the NEPDG], and if so, to what extent.*" Pet. App. 17a (emphasis added). In sharp contrast, the relief available under FACA includes, but is not limited to, access to a far larger body of information and documentation, including all "*records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee . . . .*" 5 U.S.C. App. 2(10)(b) (emphasis added). The discovery ordered below -- especially after the court of appeals' further limitations -- clearly is far narrower than the broad array of records that would have to be made available to Respondents should they ultimately prevail on the merits.

Petitioners assert that the very limited discovery authorized by the lower courts creates "extreme interference" with the Executive Branch and a "general warrant to search" anywhere for evidence of de facto committee members. Pet. Br. 28, 35. They claim that "a President should not be forced to conduct an extensive -- and distracting -- line by line review of materials" and "assert privilege claims" in response to a discovery request. Pet. Br. 42. Petitioners' hyperbole notwithstanding, no "extreme interference" of any kind has

been ordered by the lower courts, nor will the President be required to undertake a line-by-line review of responsive documents and information. Not taking into account the additional limitations set forth by the court of appeals, Respondents' discovery requests consist of only nine interrogatories and eight document requests. J.A. 215, 224. They address discrete factual issues -- whether and to what extent private parties participated in the NEPDG and its subgroups. Moreover, Respondents' discovery requests were not directed to the President or the Vice President individually, but, rather, to Petitioners as a group. Even Petitioners have conceded that the allegedly "distracting" review necessary to comply with the district court's order (again, before it was narrowed further by the court of appeals), involves nothing more than the review of twelve boxes of documents by eight Justice Department attorneys, preparation of a privilege log, and assertion of any objections to the disclosure of particular documents. J.A. 283.

Petitioners' claims of "extreme interference" also are exaggerated, entirely speculative, and without foundation, as Petitioners have not raised any specific objections to any discovery request or made any assertions of privilege. Thus far, the district court merely ordered Petitioners to "file detailed and precise objections to particular requests" or "identify and explain their invocations of privilege with particularity" (Pet. App. 5a) and, when Petitioners refused to do so, to "produce non-privileged documents and a privilege log" by a date certain. Pet. App. 6a. Petitioners also have been offered, but thus far stubbornly declined, the opportunity to have any allegedly privileged materials reviewed *in camera* by the district court or by a special master. J.A. 247.

Nor do the lower courts' discovery orders raise constitutional concerns themselves. It is well-settled that officials of the Executive Branch do not have absolute immunity from suit or discovery. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982) ("Suits against other officials -- including Presidential aides -- generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself"). This Court has consistently held that even the President, from whom Respondents have not sought discovery, is not "above the law" and is subject to judicial process. *Nixon I*, 418 U.S. at 707 ("neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances"); *Clinton v. Jones*, 520 U.S. 681, 697 (1997). As this Court has explained, it is not correct to

> presum[e] that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. "Our . . . system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" *Mistretta*, 488 U.S. at 381 (quoting *Buckley*, 424 U.S. at 121). As Madison explained, separation of powers does not mean that the branches "ought to have no partial agency in, or no control over the acts of each other."

Clinton, 520 U.S. at 702-03.

Far from being "unprecedented," as Petitioners claim (Pet. Br. 39-40), the discovery ordered by the lower courts is nothing more than an ordinary example of the routine interaction between branches of government. *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 451-52 (1977) ("*Nixon II*") ("mere screening of [Executive] materials" for purposes of privilege assertion "constitutes a very limited intrusion" and does not violate separation of powers). District courts routinely manage cases involving discovery of Executive Branch officials without unduly infringing on the Executive Branch's functioning. *See, e.g., AAPS*, 997 F.2d at 915-16 (discovery ordered to determine documents to which plaintiffs would be entitled under de facto member theory); *Natural Resources Def. Council v. Curtis*, 189 F.R.D. 4 (D.D.C. 1999) (establishing discovery guidelines in FACA case); *Alexander v. FBI*, 194 F.R.D. 299 (D.D.C. 2000) (establishing discovery and privilege rules in response to document requests directed towards White House offices). This Court has expressly noted its "confidence in the ability of our federal judges" to manage such cases. *Clinton*, 520 U.S. at 709.

Finally, in seeking to avoid even the "very tightly-reined" and "narrow, carefully focused" discovery authorized by the lower courts, Petitioners attempt to secure the benefit of executive privilege without openly invoking its protection. In a typical case in which the Executive Branch seeks to prevent the release of confidential information, the President, or someone acting on his behalf, formally invokes executive privilege. *See In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997) ("The President can invoke the privilege when

asked to produce documents or other materials that reflect presidential decision making and deliberations and that the President believes should remain confidential."). If the President does not prevail, then he may seek an interlocutory appeal under the collateral order doctrine. That has not happened here, as neither the President nor anyone acting on his behalf has attempted to assert executive privilege. Instead, Petitioners, who are themselves defendants in this action, sought mandamus review and an interlocutory appeal of the district court's discovery order before there even was any attempt to assert a privilege. Petitioners are requesting, in essence, that the Court create special rules for cases involving discovery of the Vice President and other Executive Branch officials. Consistent with its prior rulings, the Court should decline this unprecedented request.

B. The Court Of Appeals Properly Rejected Petitioners' Request For Mandamus Relief And Dismissed The Vice President's Appeal.

In denying Petitioners' request for mandamus relief, the court of appeals correctly declared that Petitioners "are entitled to mandamus relief only if they face a risk of harm that cannot be cured in the district court." Pet. App. 12a. In so ruling, the court of appeals cited extensively to this Court's prior rulings in *Kerr v. United States District Court*, 426 U.S. 394, 401 (1976) ("[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations"), *Will v. United States*, 389 U.S. 90, 95 (1967) ("only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy") and *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36

(1980) ("[e]mphasizing the rarity of mandamus relief, the Supreme Court noted that 'our cases have answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, *hardly* ever!'"). Pet. App. 7a-8a. Ultimately, the court of appeals "follow[ed] closely in the Supreme Court's footsteps in *Kerr*," in which this Court denied a writ of mandamus seeking to challenge a discovery ruling because the lower court's ruling provided petitioners "an avenue far short of mandamus" to protect their interests. Pet. App. 18a -19a (quoting *Kerr*, 426 U.S. at 404-05). The court of appeals declared, "We are equally confident that the district court here will protect petitioners' legitimate interests and keep discovery within appropriate limits -- or as the district court itself put it, 'tightly reined discovery.'" Pet. App. 19a.

Petitioners do not cite, much less attempt to explain, how the court of appeals misapplied *Kerr* or this Court's other rulings governing mandamus. Denial of mandamus relief was entirely appropriate, because, as the court of appeals found:

> [P]etitioners' primary argument -- that the broad discovery plaintiffs seek will violate the separation of powers -- is premature. Petitioners have yet to invoke executive privilege, which is itself designed to protect the separation of powers . . ., and the narrow discovery we expect the district court to allow may avoid the need for petitioners even to invoke the privilege.

Pet. App. 22a-23a. Moreover, Petitioners "can point to no harm because [they have] yet to specify any privileged materials or otherwise cite objections for consideration by the

District Court." Pet. App. 27a (Edwards, J., concurring); *see also National Ass'n of Criminal Def. Lawyers, Inc. v. U.S. Dep't of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999). Rather than grant Petitioners the extraordinary relief of a writ of mandamus, the court of appeals properly directed Petitioners to avail themselves of the protections offered by the district court.

Petitioners' mandamus argument nonetheless relies heavily on this Court's ruling in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). Pet. Br. 39-40. Petitioners claim that the court of appeals' refusal to grant them mandamus relief was somehow inconsistent with *Public Citizen*, but they ignore the fact that *Public Citizen* did not involve any issue of discovery, or even any claim that authorizing discovery of high-level Executive Branch officials implicated separation of powers concerns. High-level Executive Branch officials are not immune from discovery, as Judicial Watch has demonstrated. *See* Section II(A), *supra*. *Public Citizen* did not rule otherwise. That case also was before the Court on a final judgment, not on a discovery order. Petitioners simply try to read too much into *Public Citizen* in arguing that it supports their claim for mandamus relief.

Curiously, Petitioners also cite *United States v. Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989) for the remarkable proposition that they should not even have to invoke executive privilege in order to be entitled to mandamus relief. Pet. Br. 42. *Poindexter* provides no solace to Petitioners, however, because, as the district court found,

it is "easily distinguishable" and "inapposite." J.A. 399.[5] In *Poindexter*, former President Ronald Reagan moved to quash a document subpoena served on him during the criminal prosecution of former National Security Advisor John Poindexter. *Poindexter*, 727 F. Supp. at 1503. President Reagan argued that the scope of the subpoena was unreasonable and oppressive. *Id.* His motion to quash also referenced, but did not invoke, executive privilege. *Id.* Following the long-established principle of constitutional avoidance, the *Poindexter* court narrowed the scope of the subpoena as a means of balancing the interests of the parties without prematurely requiring the court to resolve the constitutional questions raised by the subpoena. In this important respect, *Poindexter* is in complete harmony with the case *sub judice*, where the court of appeals properly narrowed Respondents' already limited discovery requests to Petitioners and cautioned the district court to keep a tight rein on discovery so as to avoid, if possible, any need to decide any constitutional questions concerning separation of powers. Equally important, *Poindexter* rejected the position advanced by Petitioners here, namely, that a party seeking discovery from the Executive Branch must show a heightened standard

---

[5] The district court below reprimanded Petitioners for misstating the relevance of *Poindexter*:

> Once again, the defendants have misrepresented precedent in order to fit it within their theory that a party must make some showing of "need" before an Executive Branch defendant should be even required to review documents responsive to a Court-approved discovery request, and to determine if viable grounds for assertion of a privilege exists.

J.A. 400.

of need, in addition to relevance and materiality. *Poindexter*, 727 F. Supp. at 1505-07. Thus, far from supporting Petitioners' request for mandamus relief, *Poindexter* undermines the request.

Petitioners also claim that the Vice President is entitled to an immediate, interlocutory review of the district court's otherwise non-appealable discovery order pursuant to the provisions of 28 U.S.C. § 1291. "As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). Petitioners cite *Nixon I* for the proposition that the Vice President should be allowed to take an immediate, interlocutory review of the district court's discovery ruling, even though *Nixon I* involved review of an order entered *after* President Nixon had asserted executive privilege. *Nixon I*, thus, is readily distinguishable from the facts of this case because (1) *Nixon I* involved the President, not the Vice President; and (2) the President had invoked executive privilege in *Nixon I*, whereas there has been no assertion of privilege, much less an objection to the scope of discovery, in this case.

In addition, unlike in *Nixon I*, the Vice President is not faced with the "unseemly" prospect of being held in contempt of court, as Petitioners contend. Pet. Br. 43. The Vice President has had every opportunity to object to the scope of discovery, assert claims of privilege, or have responsive materials considered *in camera* by the district court or reviewed by a special master. He has declined to avail himself of any of these opportunities. In the event that the Vice President continues to refuse to participate in discovery, Respondents and the district court have all of the mechanisms

available under Rule 37 of the Federal Rules of Civil Procedure to review his conduct and compel his compliance, none of which necessarily include his being held in contempt. Fed.R.Civ.P. 37. This stands in marked contrast to *Nixon I*, in which a grand jury subpoena had been served on President Nixon and the only review mechanism and remedy available was contempt. Nor do Petitioners offer any rationale as to why the special protection afforded to presidents under *Nixon I* should be extended to vice presidents, or how far down into the Executive Branch this special protection should extend.

Finally, it is ironic that Petitioners argue *Nixon I* should be extended to the Vice President because "the President is in many respects the real party in interest." Pet. Br. 44. If Respondents' discovery requests were directed to the President -- and they clearly are not -- then the President could assert executive privilege or raise any other privileges or objections he might choose to make, and those privileges and objections most likely would be reviewable either under *Nixon I* or the collateral order doctrine. Far from demonstrating that *Nixon I* and the collateral order doctrine should be extended to the Vice President in this case, Petitioners' argument actually shows why they should not be extended.

C. Petitioners' Ancillary Arguments Regarding The Lower Courts' Rulings Lack Merit.

In attempting to immunize themselves from discovery, Petitioners also raise several ancillary arguments that are not directly related to their efforts to effectively rewrite FACA or

have the statute declared unconstitutional. These arguments lack merit individually and collectively.

First, Petitioners argued in the district court that the APA did not apply to either the NEPDG or the Vice President. The district court agreed and dismissed these claims. Pet. App. 77a-79a; 122a-23a. Nevertheless, Petitioners try to apply a principle of APA law -- that a "presumption of regularity" attaches to the actions of government agencies -- to Respondents' claims for mandamus relief. Petitioners' argument is unprecedented. They cite no authority for applying a "presumption of regularity" to a mandamus claim. In fact, Petitioners' chief authority, *United States v. Armstrong*, 534 U.S. 456 (1996), concerned the rejection of several criminal defendants' motion to dismiss an indictment on the grounds of selective prosecution. Clearly, *Armstrong* is readily distinguishable. There is no "presumption of regularity" as applied to mandamus actions. If such a presumption were created, it would represent a dramatic reduction in the ability of plaintiffs to remedy government misconduct, not only under FACA, but in any action against government officials. *See generally Clinton*, 520 U.S. at 705 (noting the judiciary's power to review the legality of even the President's official conduct); *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.") .

Second, Petitioners try to resurrect their flawed argument rejected by the district court that Respondents' claims are not reviewable under mandamus. Pet. Br. 24-26. On the

contrary, the district court's conclusion was fully in keeping with the "general presumption of reviewability" when a federal statute is violated and no other cause of action is available. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (citing *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) (courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.").

In addition, Respondents plainly alleged a right to the information they seek. *Leedom*, 358 U.S. at 188 ("a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."). Judicial Watch requested, and was denied, access to "all minutes and final decision documents" and a listing of all parties that participated in the NEPDG, among other relief. J.A. 30-31. Judicial Watch seeks this information as a nonprofit corporation that "undertakes educational and other programs to promote and protect the public interest in matters of public concern." J.A. 17. Petitioners' refusal of Judicial Watch's request for information, and Petitioners' failure to abide by the provisions of FACA, represent a specific "deprivation of a right" to which Respondents are entitled to relief. Consequently, mandamus is available to secure Judicial Watch's request for access to the records of the NEPDG.

Third, Petitioners argue that discovery would be inappropriate if this were an APA case, which they contend it is not. Pet. Br. 26. Petitioners cite no authority, however, as to why Respondents are not entitled to the same discovery

rights in a mandamus case as they would be in any other civil action. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (The civil discovery rules are "available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant."). As Petitioners concede, moreover, discovery is appropriate even under the APA if a "gap" exists in the administrative record. Pet. Br. 27 n.4. In this case, no APA-type "administrative record" exists; there is only the President's initial memorandum and the NEPDG's final report. Even consideration of the self-serving Knutson affidavit, created during litigation and never part of the "record," would not fully resolve questions concerning whether and to what extent private, non-governmental parties may have participated in the NEPDG. *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 419 (1971) ("litigation affidavits" not part of the record); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (when administrative record is "so bare that it prevents effective judicial review," no presumption is justified). Accordingly, in the absence of an "administrative record," limited discovery, like that ordered below, is entirely appropriate.

II. The Lower Courts' Application of FACA Was Consistent With The Plain Language Of The Statute.

Although both the district court and the court of appeals properly authorized narrow, carefully focused discovery in order to postpone, if not avoid, reaching any constitutional issues, and although the appellate court properly applied ordinary principles of mandamus review and the law governing interlocutory appeals in affirming the district

court's discovery order, Petitioners nonetheless argue that this Court should review the lower courts' discovery rulings by considering the merits of Respondents' claims. They seek to transform review of the denial of their request for the extraordinary relief of mandamus and the dismissal of their unprecedented interlocutory appeal into an even more extraordinary review by this Court on the merits. Even if this Court were to consider Respondents' claims on the merits, it should reject Petitioners statutory construction argument.

The balance and disclosure requirements of FACA are implicated whenever an advisory committee not composed solely of "full time, or permanent part-time, officers or employees of the federal government" is "established *or* utilized" by the President. 5 U.S.C. App. 3(2)(B) (emphasis added). Judicial Watch recognizes, as Petitioners do, that, in enacting FACA, Congress foresaw regulation of the process by which the President and other Executive Branch officials obtain information in performing functions assigned to them by the Constitution might implicate important constitutional concerns. Judicial Watch also recognizes, as Petitioners do, that Congress sought to resolve these concerns by (1) exempting from FACA's reach all advisory committees composed solely of "full-time, or permanent part-time, officers or employees of the federal government" and (2) leaving it to the President or his subordinates to choose whether to establish *or* utilize an advisory committee that includes outside members and, thereby, is subject to FACA's balance and disclosure requirements. The issue raised by this lawsuit is whether FACA's disclosure requirements are triggered where an advisory committee consisting solely of full-time officers or employees of the federal government is "established" by the President, but, subsequently, the

committee is expanded to permit private, non-governmental parties to participate, and the President nonetheless "utilizes" the committee's work.

Petitioners argue that the Court should disregard the plain language of FACA by adopting an unduly restrictive definition of what it means for the President to have "established" an advisory committee. Petitioners' proposed statutory construction would effectively eviscerate FACA. More importantly, it also ignores FACA's applicability to advisory committees "utilized" by the President.

The starting point -- and the ordinary stopping point -- for analyzing the application of a statute to any set of facts is the plain language of the statute itself. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). "In a statutory construction case, the beginning point must be the language of the statute, and, when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart*, at 475.

The language of FACA is clear:

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . is
>
> (A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such terms excludes (i) any committee which is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration

5 U.S.C. App. 3(2).

Petitioners cannot, and do not, argue that the President did not "establish" the NEPDG. They even use the word "established" in their brief to describe the President's creation of the NEPDG:

> Less then ten days after taking office, President Bush *established* the [NEPDG] as an entity within the Executive Office of the President to advise the President in formulating energy policy.

Pet. Br. 3 (citing, J.A 156-59) (emphasis added).

Nor can they argue that the President did not "utilize" the NEPDG in the ordinary sense of the word. They admit as much:

> On May 16, 2001, the NEPDG submitted to the President, and with his approval, published its report containing recommendations to enhance energy supplies and encourage conservation . . . .
>
> On June 28, 2001, the President transmitted to Congress the NEPDG Report and, according to the accompanying message, its "proposals . . . that require legislative action. In his message, the President stated that "[o]ne of the first actions" he took as President "was to create the [NEPDG] to examine American's energy needs and to develop a policy to put our Nation's energy future on sound footing." He explained that the "legislative initiatives" included in the report would help address energy challenges with "enormous implications for our economy, our environment, and our national security."

Pet. Br. 4-5 (citation omitted). Based on the plain language of FACA, it is obvious that the President both established *and* utilized the NEPDG. The only true question, then, is a question of fact: whether the NEPDG, as established *or* utilized by the President, was "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government?" 5 U.S.C. App. 3(2).

Nonetheless, Petitioners argue that the lower courts should have construed FACA differently. They assert that an advisory committee is only "established" to the extent it is "specifically authorized by statute or by the President." Pet. Br. 18 (citing 5 U.S.C. App. 9(a)). Petitioners argue that, if the President did not "specifically authorize" an advisory

committee to include as members persons who were not full-time or permanent part-time federal officers or employees, then an advisory committee cannot have been "established" as such and FACA cannot apply.

Petitioners' argument only begs the question. The NEPDG was created and established by the President in a January 29, 2001 memorandum. J.A. 156-59. Whether the President, after establishing the NEPDG in his January 29, 2001 memorandum, directed the advisory committee's members to allow former Enron chief executive Kenneth Lay or other private, non-governmental parties to participate in the committee's meetings and deliberations logically does not call into question whether the NEPDG was established or specifically authorized by the President in the first instance. Similarly, whether members of the NEPDG regularly met with energy industry representatives as part of their meetings and deliberations does not negate the establishment of the committee, nor does it mean that the President did not specifically authorize the establishment of the committee in his January 29, 2001 memorandum. In either event, the President still utilized the results of the NEPDG's efforts when he published and approved the committee's recommendations and conveyed them to Congress.

In addition, nothing in Section 9 of FACA purports to limit or define the membership of an advisory committee. It is an administrative provision that describes how advisory committees are to be established, not who can be considered a member. The section requires advisory committees to be "specifically authorized by statute or by the President," or "determined as a matter of formal record, by the head of the agency involved after consultation with the Director

[Administrator] . . . to be in the public interest . . . ." 5 U.S.C. App. 9(a). It requires a charter to be filed with the Administrator of the General Services Administration ("GSA") or the agency head and standing committees of Congress having legislative jurisdiction over the agency. 5 U.S.C. App. 9(c). It specifies the contents of the charter, and, finally, requires that a copy of the charter be furnished to the Library of Congress. 5 U.S.C. App. 9(c). Petitioners try to use Section 9 for a purpose that is other than the purpose described by the plain meaning of its text.

Nor can Petitioners rely on regulations promulgated by GSA to bolster their statutory construction argument. The Court addressed these very same regulations in *Public Citizen* and found them unpersuasive. 491 U.S. at 456 n.12. This Court need not defer to GSA's interpretation of FACA because, among the other compelling reasons set forth in *Public Citizen*, the regulations at issue were not promulgated pursuant to any express statutory authority regarding FACA, and GSA has not been empowered to issue a regulatory definition of the term "advisory committee" that carries the force of law. *Id.*

Moreover, Petitioners' proposed construction of FACA would render violations of what otherwise are clear, indisputable, and non-discretionary legal duties effectively unreviewable. All a president or agency head would need to do to avoid the balance and disclosure requirements of FACA is declare that a committee be composed of full-time or permanent part-time federal officials or employees only, and the committee could not be subject to judicial review regardless of its operational reality. FACA could be violated with impunity merely by paying lip service to the composition

of the committee's membership. This cannot be a proper construction of the statute and cannot be considered to be consonant with the purpose of FACA. Such a construction would eviscerate FACA and defeat the important goals the statute was designed to achieve when it was enacted into law. *See, e.g.*, 5 U.S.C. App. 2.

Nor does Petitioners' extremely limited interpretation of what it means for an advisory committee to be "established" under FACA support the relief Petitioners ultimately seek. Petitioners' argument ignores FACA's inclusion of the word "utilized" in defining an advisory committee as any advisory group or subgroup "established *or* utilized by the President." 5 U.S.C. App. 3(2)(B) (emphasis added). The President may have "established" the NEPDG as an advisory committee composed solely of federal officials, even using Petitioners' very narrow definition of the word, but nonetheless may have "utilized" the NEPDG as composed, in fact, of both federal officials and private, non-governmental parties, as Respondents have alleged. Consequently, even if this Court were to adopt Petitioners' definition of "established" under FACA, Respondents' claims nevertheless would continue.

When confronted with this question of fact about the membership of the NEPDG, both the district court and the court of appeals looked to a prior ruling that answered the question in the only reasonable, logical, and convincing way possible. In *AAPS*, the court was confronted with the question of whether certain consultants who participated in the President's Task Force on National Health Care Reform were members of the advisory committee. The court held:

> The key issue, it seems to us, is not whether these consultants are "full time" government employees under section 3(2), but whether they can be considered members of the working group at all. When an advisory committee of wholly government officials brings in a "consultant" for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee. . . . We are confident that Congress did not intend FACA to extend to episodic meetings between government officials and a consultant. To do so would achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens.
>
> But a consultant may still be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a "consultant" regularly attends and fully participates in working groups as if he were a "member," he should be regarded as a member.

AAPS, 997 F.2d at 915. The appellate court did not see fit to question whether the President, in creating the Task Force on National Health Care Reform, "established" or "utilized" that advisory committee in the ordinary sense of those words. In fact, the result was so obvious that the government in *AAPS* did not even raise the issue. *Id.* at 903. The construction of FACA applied by both the district court and the court of appeals was entirely proper.

Moreover, applying the plain meaning of the words in FACA to the facts in this case does not mean the lower courts would have to undertake "standardless, amorphous, post-hoc review" of an advisory committee's membership. Establishing standards of review and applying those standards to a set of facts is exactly what courts do, and is what the appellate court actually did in *AAPS*.

Finally, is it not sufficient to ignore the plain meaning of FACA, as Petitioners urge the Court to do, on the purported basis of constitutional avoidance. In his concurrence in *Public Citizen*, Justice Kennedy specifically warned against adopting disingenuous interpretations of statutes in order to avoid constitutional questions:

> Although I agree that we should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided," this principle cannot be stretched beyond the point at which such a construction remains "*fairly* possible." And it should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretative shadows cast by constitutional provisions that might or might not invalidate it. The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of a statute. If that were permissible, then the power of judicial review of legislation could be made unnecessary, for whenever the application of the statute would have potential inconsistency with the Constitution, we could merely opine that the statute did not cover the conduct in question because it would be discomforting or even absurd to think that Congress intended to act in an unconstitutional manner. The utter circularity of this approach explains why it has never been our rule.

Public Citizen, 491 U.S. at 481 (emphasis original) (citations omitted). The obvious solution is to follow the doctrine of constitutional avoidance down a different path: limited, narrowly focused discovery into "whether non-federal officials participated [in the NEPDG] and, if so, to what extent." Pet. App. 17a; *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (courts should only rule on constitutional issues as a last resort). This is exactly the course of action followed by both the district court and the court of appeals.

III. FACA Does Not Violate The Constitution As Applied To The NEPDG.

Although Judicial Watch respectfully submits that this Court's review of the lower courts' rulings should be limited to the court of appeals' denial of Petitioners' request for mandamus relief and dismissal of Petitioners' interlocutory appeal, in the event the Court reaches Petitioners' constitutional claims, it should apply long-standing precedent and uphold the constitutionality of FACA.

Any analysis of FACA begins, of course, with the "formulary caution" that great deference is owed to Congress' view that what it has done is constitutional and is entitled to a "presumption of constitutionality." *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (citing *Rostker v. Goldberg*, 453 U.S. 47, 64 (1981); *Fullilove v. Klutznick*, 448 U.S. 472

(1980) (opinion of Burger, C.J.); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 91, 102-03 (1973); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963)). Petitioners do not even attempt to rebut the "presumption of constitutionality" in their argument.

Instead, Petitioners ask the Court to apply a "bright-line" test to separation of powers issues by which any statute touching on the President's exclusive, enumerated powers would necessarily violate the balance struck by the constitution. Pet. Br. 28-34. They argue that the powers contained in the Recommendations and Opinion Clauses of the U.S. Constitution are exclusive, enumerated, Presidential powers and, consequently, "are not subject to manipulation or interference by Congress."[6] *Id.* No majority of this Court has ever endorsed such a "bright-line" test. *Cf. Morrison*, 487 U.S. at 711 (Scalia, J., dissenting) (noting "balancing test" adopted by majority); *Public Citizen*, 491 U.S. at 484-87 (Kennedy, J., Rehnquist, C.J., and O'Connor, J., concurring) (noting "balancing test"). In fact, Petitioners' argument ignores more than thirty years of precedent applying a balancing test to separation of powers issues.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson recognized that the three branches of government do not function completely apart, but instead are

---

[6] The Opinion Clause states, "The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to their respective Offices." U.S. Const. art. II, § 2. The Recommendations Clause states, "He shall . . . recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3.

intended to complement each other. Justice Jackson observed:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispensed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress . . . .

Youngstown, 343 U.S. at 635.

In *Nixon I*, the Court further elaborated on the separation of powers principles enunciated by Justice Jackson in *Youngstown Sheet & Tube Co.* The Court in *Nixon I* unanimously held that President Nixon did not possess absolute immunity from judicial process after he made generalized assertions of executive privilege in response to a grand jury subpoena. The President argued that the need to protect communications between high government officials and the independence of the Executive Branch within its own sphere precluded enforcement of the grand jury subpoena. The Court soundly rejected President Nixon's claims:

> However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an

absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

Nixon I, 418 U.S. at 706. In balancing the President's "generalized interest in confidentiality" against the "fundamental demands of due process of laws in the fair administration of justice," the Court determined that the President's generalized interest had to yield. *Id.* at 713.

In *Nixon II*, the Court again applied a balancing test in upholding the constitutionality of the Presidential Recordings and Materials Preservation Act ("the Act"). The Act directed the Administrator of General Services to take custody of Presidential papers and tape recordings, among other materials belonging to former President Nixon, and to promulgate regulations governing public access to the materials. The Court flatly rejected President Nixon's argument that the Act's "regulation of the disposition of Presidential materials within the Executive Branch, without

more, violated the principle of separation of powers." *Nixon II*, 433 U.S. at 441. In so ruling, the Court noted that it had adopted a "more pragmatic, flexible approach" to separation of powers in *Nixon I* and "essentially embraced" Justice Jackson's view in his concurrence in *Youngstown Sheet & Tube Co. Id.* at 442-43. It expressly rejected what it called an "archaic view of the separation of powers as requiring three airtight departments of government." *Id.* at 443. Citing *Nixon I*, the Court continued:

> Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Id. (citing *Nixon I*, 418 U.S. at 711-12).

Importantly, the Court in *Nixon II* also cited a significant history of statutory regulation of Executive Branch materials in reaching its conclusion that the Act was not unduly disruptive of the Executive Branch:

> And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. Such regulation of materials generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Similar congressional

> power to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain.

Nixon II, 433 U.S. at 445 (citing FOIA, 5 U.S.C. § 552; the Privacy Act of 1974, 5 U.S.C. § 552a; the Government in the Sunshine Act, 5 U.S.C. § 552b; the Federal Records Act, 44 U.S.C. § 2101, *et seq.*; and a variety of other statutes, *e.g.*, 13 U.S.C. §§ 8-9 (census data); 26 U.S.C. § 6103 (tax returns)).[7]

The Court applied a balancing test again in *Morrison*, a case involving a legal challenge to the constitutionality of the Ethics in Government Act of 1978. *Morrison*, 487 U.S. at 693-94; *id.* at 711 (Scalia, J., dissenting) (noting "balancing test" adopted by majority). The independent counsel law, it was contended, impermissibly undermined the Executive Branch's ability to accomplish its constitutionally assigned duty to "take care that the laws be faithfully executed" by limiting its ability to supervise and control the investigation and prosecution of criminal activity by high-ranking government officials. The Court, citing *Youngstown Sheet & Tube Co.*, *Nixon I*, and *Nixon II*, held that the independent counsel law did not violate separation of powers principles because the Executive Branch retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 694-96. The Court also found it significant that the

---

[7] The Court in *Nixon II* also noted that the Executive Branch "became a party to the Act's regulation" when it was signed into law by President Ford. 433 U.S. at 441. Conspicuously absent from Petitioners' argument is any recognition of the fact that the Executive Branch similarly became a party to FACA's regulatory scheme when it was signed into law, ironically by President Nixon.

independent counsel law was not an attempt by Congress to increase its own powers at the expense of the Executive Branch. *Id.* at 694.

In light of this long-standing precedent, the Court should apply the balancing test of *Youngstown Sheet & Tube Co.*, *Nixon I*, *Nixon II*, and *Morrison* in considering Petitioners' constitutional challenge to FACA. It should reject Petitioners' extraordinary and unprecedented request for a "bright-line" test.

Applying this balancing test to FACA, it is clear that the statute is fully consonant with the separation of powers doctrine. The powers contained within the Recommendations Clause and the Opinion Clause are not exclusive powers of the President, unlike the "pardon" power (*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), the "prosecutorial" power (*Morrison*), the "nomination" power (*Public Citizen*), or the "presentment" power (*INS v. Chadha*, 462 U.S. 919 (1983)). Nor are they particularly significant powers. In *Youngstown Sheet & Tube Co.*, Justice Jackson discussed the different Executive powers enumerated in the Constitution, describing the powers included in Article II, Sections 2 and 3, including specifically the Opinion Clause, as "trifling." 343 U.S. at 641 n.9.

The Opinion Clause cannot be considered "exclusive" because it has long been recognized that Congress possesses wide-ranging investigative power. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). Without question, Congress' investigative power includes the power to receive information from the Executive Branch. More importantly, the Opinion Clause is not even implicated by FACA because

the statute creates an exception for advisory committees that are composed "wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 3(2)(C). If anything, FACA respects the Opinion Clause by including this exception. FACA regulates only the President's solicitation and use of the opinions of private, non-governmental parties participating in advisory committees. This "power" is not enumerated anywhere in the text of the Constitution, and, consequently, would fail even Petitioners' "bright-line" test.

The Recommendations Clause is not even an "executive" power; it is a legislative power, or, at most, a hybrid power that the President shares with Congress. Under the Constitution, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. Const. art. I, § 1. Congress can and does recommend its own legislation. In fact, only a member of Congress can introduce a bill for consideration by Congress. Charles W. Johnson, Parliamentarian of the U.S. House of Representatives, *How Our Laws are Made*, § 7 (2001), at http://thomas.loc.gov ("there is no constitutional or statutory requirement that a bill be introduced to effectuate the recommendations [of the President]"). The President must rely on a member of Congress to introduce any legislation he or she recommends for consideration. *Id.* As with the Opinion Clause, the Recommendations Clause would fail even Petitioners' "bright-line" test.

In addition, it simply cannot be said that FACA prevents the President from accomplishing any constitutionally assigned functions. Nothing in FACA prevents the President

from conferring with his or her principal officers and advisers to decide what, if any, proposals to submit to Congress. The President also remains completely free to solicit opinions from his principal officers and advisers, as well as private, non-governmental parties, on any subject matter, including proposed legislative schemes to recommend to Congress. The President certainly retains the choice not to solicit advice from advisory committees; he can do so through less formal mechanisms. *See, e.g., Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.D.C. 1975) (FACA does not apply to *ad hoc* meetings of advisers).

Any purported intrusion by FACA on Presidential power is, at most, *de minimis*. Again, the President retains a wide range of choices on how to obtain advice and formulate recommendations to submit to Congress, and well-recognized legal doctrines, such as executive privilege, remain available to protect the President's interests. If, in *Morrison*, the independent counsel law did not create an unconstitutional interference with the Executive Branch's core function under Article III, Section 3 to "take care that the laws be faithfully executed," then certainly FACA cannot be found to interfere impermissibly with the Executive Branch's power to make recommendations to Congress. *Morrison* conclusively demonstrates FACA's constitutionality.[8]

---

[8] The Court in *Morrison* found it important that Congress had not sought to increase its own powers at the expense of the Executive Branch in enacting the independent counsel law. *Morrison*, 487 U.S. at 694. FACA, like the independent counsel statute in *Morrison*, "simply does not pose a danger of congressional usurpation of Executive Branch functions." *Id.* (quotations omitted).

Moreover, FACA serves both a significant Congressional interest and a significant public interest by restoring confidence in the integrity of governmental decision-making. FACA's most compelling purpose -- to reveal the hidden influence of special interests on advisory committees -- has important effects throughout the body politic.[9] *Public Citizen*, 491 U.S. at 453; *Minneapolis Star & Tribune Co. v. Minnesota Commn'r of Revenue*, 460 U.S. 575, 585 (1983) (an informed public is the essence of a working democracy). FACA recognizes and codifies the important public interest in knowing whether private, non-governmental parties are participating on federal advisory committees, because, unlike federal officials, private individuals are not accountable under our political system. That is why Congress provided, first and foremost, that "advisory committee meetings shall be open to the public." 5 U.S.C. App. 10(a)(1). These important objectives of FACA must weigh heavily in favor of the statute's constitutionality.

While Petitioners look to the minority position in Justice Kennedy's concurrence in *Public Citizen* for support, that opinion is unavailing. Pet. Br. 36-37. Unlike the ABA committee in *Public Citizen*, the NEPDG unquestionably falls within FACA's reach. More importantly, unlike this case, *Public Citizen* implicated an exclusive, core power of the President -- the power to nominate federal judges. As Petitioners cite, Justice Kennedy's concurrence in *Public Citizen* stated that "[w]here a power has been committed to a particular Branch of the Government in the text of the

---

[9] In contrast, Petitioners cavalierly dismiss the important public purposes underlying FACA, stating that Respondents here have no "meaningful need for the information that they seek." Pet. Br. 35.

Constitution, the balance already has been struck by the Constitution itself." 491 U.S. at 486. As discussed above, the Recommendations and Opinion Clauses are far from exclusive powers committed to any *particular* branch. They much more resemble "trifling" powers, as Justice Jackson described them, or shared powers. Even if Justice Kennedy's concurrence were a majority opinion, it would not be controlling here.

Finally, as in *Nixon II*, the significant history of statutory regulation of Executive Branch materials -- which is exactly what is at issue in the case *sub judice* because the remedy available to Respondents is disclosure of the NEPDG's records -- further demonstrates that such regulation has never been considered unduly invasive of Presidential powers but, instead, promotes important informational goals. *Nixon II*, 433 U.S. at 445. This case pleads for a similar result.

CONCLUSION

For the foregoing reasons, Respondent Judicial Watch, Inc., respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

Paul J. Orfanedes*
James F. Peterson
Michael J. Hurley
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Respondent
Judicial Watch, Inc.

March 2004

* Denotes Counsel of Record

Supreme Court, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

(11)

No. 03-475

IN THE
Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT SIERRA CLUB

ALAN B. MORRISON
(COUNSEL OF RECORD)
SCOTT NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington D.C. 20009
(202) 588-7720

DAVID BOOKBINDER
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
408 C Street, NE
Washington, D.C. 20002
(202) 548-4598

PATRICK GALLAGHER
ALEX LEVINSON
SANJAY NARAYAN
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
85 Second Street
San Francisco, CA 94104
(415) 977-5769

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Because this Court is obligated to consider jurisdictional questions first, and because respondent believes that the questions presented by petitioners do not properly present the issues before this Court, respondent has re-ordered and re-stated the questions presented as follows:

1. Did the court of appeals correctly conclude that it lacked appellate jurisdiction over petitioners' collateral order appeal and petition for a writ of mandamus where (a) petitioners' primary objection was that the district court improperly failed to dismiss these complaints and, therefore, allowed limited discovery to proceed, and (b) there is no reasonable likelihood that any petitioner would be held in contempt or will be deprived of a meaningful opportunity to obtain appellate review over the alleged errors of the district court?

2. Did the district court correctly refuse to dismiss these Federal Advisory Committee Act cases where it concluded that the factual record put forth by petitioners was insufficient to decide the issues presented?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 11

Introduction 11

I. THE COURT OF APPEALS LACKED JURISDICTION OVER THE QUESTIONS THAT PETITIONERS PRESENTED TO IT 14

A. Petitioners' Claims Of Error 14

B. The Court of Appeals Lacked Jurisdiction Under Section 1291 16

C. There Was No Mandamus Jurisdiction in the Court of Appeals 22

II. THE DISTRICT COURT PROPERLY DENIED PETITIONERS' MOTION TO DISMISS 26

A. The Document Establishing an Advisory Committee Does Not Conclusively Determine Its Membership 26

B. There Are No Special Hurdles for a Plaintiff to Overcome In Order to Obtain Discovery in a FACA Case 32

C. Applying FACA to a Presidential Committee to Which Private Persons Are Invited to Participate Does Not Violate Principles of Separation of Powers 39

CONCLUSION 44

TABLE OF AUTHORITIES

CASES

Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936) 40

Association of Physicians & Surgeons, Inc. v. Clinton,
997 F.2d 898 (D.C. Cir. 1993) ..... *passim*

Center for National Securities Studies v. Department of Justice,
217 F. Supp. 2d 58 (D.D.C. 2002) 20

Chamber of Commerce v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 39

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 34, 35

Clinton v. Jones,
520 U.S. 681 (1997) 14, 16, 20

Clinton v. City of New York,
524 U.S. 417 (1998) 31

Crawford-El v. Britton,
523 U.S. 574 (1998) 37

Dellums v. Powell,
561 F.2d 242 (D.C. Cir.), *cert. denied*,
434 U.S. 880 (1977) 37

Federal Maritime Commission v. South Carolina Ports Authority,
536 U.S. 743 (2002) 31

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 10, 24, 27

Helstoski v. Meanor,
442 U.S. 500 (1979) 23

Home Box Office v. Federal Communications Commission,
567 F.2d 9 (D.C. Cir. 1977) 34, 36

In the Matter of the Eastern Cherokees,
220 U.S. 83 (1911) 23

Kerr v. United States District Court,
426 U.S. 394 (1976) 25

Leatherman v. Tarrant County,
507 U.S. 163 (1993) 32

In re Lewis,
212 F.3d 980 (7th Cir. 2000) 18

Midland Asphalt Co. v. United States,
489 U.S. 794 (1989) 16

Mitchell v. Forysth,
472 U.S. 511 (1985) 16

Morrison v. Olson,
487 U.S. 654 (1987) 42

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 16

Nixon v. General Services Admin.,
433 U.S. 425 (1977) 11, 41

In re Papandreou,
139 F.3d 247 (D.C. Cir. 1998) 20, 28

Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority,
685 F.2d 547 (D.C. Cir. 1982) 36

Providence Journal Co. v. FBI,
595 F.2d 889 (1st Cir. 1979) 20

Public Citizen v. Department of Justice,
491 U.S. 440 (1989) 11, 16, 22, 43

Sangamon Valley Television Corp. v. United States,
269 F.2d 221 (D.C. Cir. 1959) 36

Simplex Time Recorder Co. v. Secretary of Labor,
766 F.2d 575 (D.C. Cir. 1985) 37

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 14

Swan v. Clinton,
100 F.3d 973 (D.C. Cir. 1996) 38

Swint v. Chambers County Commission,
514 U.S. 35 (1995) 14

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 31

United States Postal Service v. Gregory,
534 U.S. 1 (2001) 37

United States v. Armstrong,
517 U.S. 456 (1996) 8, 20, 37

United States v. Moats,
961 F.2d 1198 (5th Cir. 1992) 17

United States v. Moussaoui,
333 F.3d 509 (4th Cir. 2003) 19

United States v. Nixon,
418 U.S. 683 (1974) 8, 16, 18, 25

Watson v. Buck,
313 U.S. 387 (1941) 43

Weir v. Propst,
915 F.2d 283 (7th Cir. 1990), *cert. denied*,
514 U.S. 1035 (1995) 17

STATUTES

28 U.S.C. § 1291 ..... 14, 25, 27

28 U.S.C. § 1292(b) 5, 6, 16, 25, 27

28 U.S.C. § 1361 ..... 4, 32, 37

Federal Advisory Committee Act, 5 U.S.C. App. 1
("FACA") ..... *passim*

§ 2 1

§ 3(2) 2, 28, 40

§ 7(c) 31

§ 9(c) 1

§ 10 1

§ 10(b) 32

5 U.S.C. § 552 33

5 U.S.C. § 553 34

5 U.S.C. § 556 34

MISCELLANEOUS

H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3491 ..... 1, 2, 29

C. Wright, A. Miller, & E. Cooper, 15A Federal Practice & Procedure § 3911 (1992) 17

Ron Suskind, *The Price of Loyalty* (Simon & Schuster, 2004) 36

STATEMENT OF THE CASE

Petitioners' brief accurately describes the basic events that occurred in the courts below. However, it omits a number of significant matters that demonstrate why there was no appellate jurisdiction in the court of appeals (and hence no jurisdiction in this Court), and why the issues that petitioners contend are presented on the merits were properly resolved at this stage of the proceedings and/or should not be resolved by this Court at this time, if ever.

At issue are two cases raising claims under the Federal Advisory Committee Act, 5 U.S.C. App. 1 ("FACA"). Among the Act's stated purposes are ensuring that "Congress and the public . . . be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees," and establishing "standards and uniform procedures" to govern committee proceedings. *Id.* § 2. Beyond these administrative goals, FACA prominently reflects Congress's concern with the threats of undue influence on advisory committees:

> One of the great dangers in [the] unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings . . . pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests.

H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972), *reprinted in* 1972 U.S. Code. Cong. & Admin. News 3491. The Act applies to committees established by the President or by an agency, and it imposes a series of requirements governing their formation, operation, and termination. *See id.* §§ 9(c) & 10. It requires that advisory committees meet certain formal

procedural requirements and conduct their business in public, subject to certain significant exceptions. As the House Report for the Act explained, these provisions "serve[] to prevent the surreptitious use of advisory committees to further the interests of any special interest group." H. Rep. No. 1017 at 6.

There is a specific exemption in FACA for committees "composed wholly" of federal officers and employees. § 3(2) (the "federal officials exemption"). Petitioners relied on this exception to claim that the National Energy Policy Development Group ("NEPDG" or the "Task Force") and its subordinate groups, which were specifically contemplated by the President's memorandum creating the Task Force (JA 157, ¶1), were not subject to FACA. There is no dispute that the order creating the Task Force and the list of members set forth in its final report are limited to federal officials, although neither document mentions members of the sub-groups that are a major focus of respondent Sierra Club's complaint. It is also undisputed that, when these complaints were filed and indeed today, under the law of the District of Columbia Circuit, the formal membership of an advisory committee is not conclusive on the applicability of the federal officials exemption. *Association of Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"). In addition, under *AAPS*, a plaintiff is entitled to discovery to determine whether, as a factual matter, non-federal officials regularly participated in the work of an advisory committee – here the Task Force or its sub-groups -- in such a manner as to become de facto members of the committee; if so, the Government may not claim the federal officials exemption. *Id.* at 915.

Prior to filing its lawsuit, respondent Judicial Watch wrote to the Office of the Vice President, citing news reports, and claiming that private persons from the energy industry had participated so extensively in the work of the Task Force that the Task Force had operated in violation of FACA. The Counsel to the Vice President responded with a brief letter denying the factual allegations, but providing no specifics to support that position. JA 123. Judicial Watch then filed suit in

the United States District Court for the District of Columbia alleging that the Task Force had operated in violation of FACA, asking for a declaratory judgment to that effect, and seeking an order that the Task Force and the other defendants comply with its requirements, including making its records available to the extent required by FACA. Several months later, respondent Sierra Club filed a similar suit in the Northern District of California, which was transferred to the District of Columbia and consolidated with the Judicial Watch case. The Sierra Club complaint specifically alleged that non-federal officials participated extensively in the work of various sub-groups, which assisted the Task Force with gathering information and making recommendations. JA 146-148. Because the sub-groups were not mentioned in the letter from Judicial Watch, the denials from the Counsel to the Vice President did not mention them or deny that their participants included non-federal personnel.

All of the defendants moved to dismiss the complaints in their entirety under Rule 12(b)(6), relying on the order creating the Task Force, its final report listing its members, and the response of the Counsel to the Vice President. In the district court petitioners did not attack the validity of *AAPS*; they simply asserted, as a matter of statutory and constitutional law, that the district court was required to dismiss the cases. They did not cite to any special or heightened pleading rules or claim any constitutional immunity from suit. Their claim was that respondents' claims must be dismissed without allowing respondents any discovery and that failure to do so would give rise to serious separation of powers issues.

After extensive briefing and full oral argument, the court issued a careful and lengthy opinion, declining to dismiss the complaint. Pet. App. 53a-123a. It agreed with the Government that FACA did not provide for an implied cause of action (*id.* at 77a) and that the Vice President was not an agency and hence could not be sued under the Administrative Procedure Act ("APA") (*id.* at 78a-79a), although the Cabinet officer defendants could. However, the court allowed the

action to proceed against the Vice President and other non-agency defendants under the mandamus statute, 28 U.S.C. § 1361, which is not limited to agency officials, because the Vice President may be responsible for actions of the Task Force. *Id.* at 90a-97a.

The court also recognized that, in some situations, demanding compliance with FACA or requiring the Vice President to disclose internal communications might violate principles of separation of powers. *Id.* at 103a. The district court concluded that, in order to decide the separation of powers issues, at least some discovery on the threshold factual question of whether private persons had participated extensively in the work of the Task Force or its sub-groups was necessary. *Id.* at 110a-117a. The district court noted that its constitutional analysis on the merits would vary, depending on whether FACA were to be applied to the Task Force or to its sub-groups, because the latter "could have been much less operationally proximate to the President, and revealing their activities would arguably infringe the President's Executive authority to a much lesser degree." *Id.* at 115a. Furthermore, the court observed, discovery might show no factual basis for respondents' claims, in which case there would be no need to decide any separation of powers issues. *Id.* at 119a.

The district court did not simply turn the plaintiffs loose to embark on whatever discovery they chose, but stated that any discovery would be "very tightly-reined." *Id.* at 118a. Thus, as part of its July 11, 2002 order denying in large part the motion to dismiss, it directed plaintiffs to submit a discovery plan in 8 days, gave defendants a week to reply, and set a hearing for August 2, 2002. *Id.* at 123a. Instead of merely submitting a plan for discovery, which would then have to be fleshed out, plaintiffs submitted a joint set of nine interrogatories and eight requests to produce documents. They are mainly directed to gathering information on the threshold issue of the extent to which private parties participated in the Task Force and its sub-groups, an inquiry that does not require the production of deliberative materials of the kind normally

exempt from public disclosure.

The position of petitioners in response to respondents' plan was the same as before: no discovery was appropriate. They did not object to specific interrogatories or requests to produce on grounds of overbreadth or intrusivness, and did not assert Executive privilege as to any of the requests. Nor did they then file an appeal, seek a writ of mandamus in the court of appeals, or ask the district court for a certification under 28 U.S.C. § 1292(b). Instead, they continued to insist that the district court was required to dismiss the case without permitting any discovery. Petitioners asserted that the APA required the district court to decide the case on the basis of what they claimed to be the "administrative record", primarily the President's memorandum announcing the Task Force's formation and the Task Force's final report.

Not surprisingly in the face of the same opposition that it had previously found wanting, the district court permitted plaintiffs to serve their proposed discovery. But when it came time to answer or object, petitioners moved for a protective order, applicable to respondents' entire discovery. Again, the objection was across-the-board, and there was no specific privilege claim or an assertion that the request was overbroad or otherwise improper. That motion also was denied, although the district court offered to review materials – or even a privilege log – in camera. JA 247-248.

Once again petitioners refused to respond or raise specific objections. This time, however, petitioners announced that they were going to the court of appeals, which they finally did on November 7, 2002, when the Vice President filed a notice of appeal and all of the defendants filed a writ of mandamus, both premised on the argument that the district court should have decided the case on the administrative record that petitioners presented. They also asked for a stay of discovery, even though they had not answered or objected to a single item of discovery, or even prepared a privilege log. The district court denied the stay motion, but extended the time to

reply once again to allow petitioners to seek a stay from the court of appeals, which granted one on December 6, 2002. While the petition for a writ of mandamus and the appeal were pending, petitioners also asked for certification under 28 U.S.C. § 1292(b), which the district court denied on November 26, 2002. JA 383-413.

After hearing oral argument, the court of appeals dismissed the appeal and writ of mandamus on July 8, 2003. The court concluded that it lacked jurisdiction because there was no final judgment and no exception applied to these interlocutory orders. In particular, the court rejected petitioners' claim that they required immediate review or they would be faced with an intolerable choice of complying with discovery that they believed was improper -- which would moot the controversy -- or being held in contempt for failing to do so. The court of appeals correctly noted that, given the stage of discovery below, petitioners were faced with no such choice at this time, if they would ever be placed in such a position. Thus, the attempt to obtain review of the district court's ruling was premature, and the court of appeals had no jurisdiction to entertain it.[1]

Judge Randolph in his dissent sided with petitioners, because he concluded that the decision in *AAPS* was wrong and should be overturned, in which case the district court would be required to dismiss the complaint. He did not explain how the court of appeals could surmount the final judgment rule to achieve that result, let alone how a panel could overturn a decision of a prior panel. Nor did he contend that, if *AAPS* was still good law, the district court acted improperly in allowing the discovery that was permitted.

---

[1] Both judges in the majority observed that the discovery served by respondents could be read to extend beyond the facts necessary to establish their claims of de facto membership by private persons on the Task Force and/or its sub-groups. However, they both expressed confidence that the district court would narrow the discovery – if petitioners ever asked the court to do that. Pet. App. 16a-19a; 25a-27a.

SUMMARY OF ARGUMENT

In order to obtain interlocutory review of these admittedly non-final orders, petitioners claim that the discovery permitted by the district court is "intrusive, invasive, and burdensome" (Br. 21), to the point where it is "at least as intrusive as the disclosure obligations imposed by FACA itself" (Br. 20-21). They recognize that intrusiveness alone would not suffice to justify interlocutory review, and so they further contend that, absent review now, the discovery orders would be "completely unreviewable" (Br. 39), with the result that the decision of the court of appeals "would improperly immunize [constitutional] violations from effective appellate review" (Br. 11). This attempted end run on the final judgment rule fails because the district court's discovery orders do not remotely resemble petitioners' characterizations of them. Moreover, there are more than adequate means of obtaining full and complete review of all the rulings that petitioners claim are in error, at the conclusion of the case in the district court. Furthermore, review can be undertaken without any reasonable likelihood that any of the petitioners will be forced to choose between compliance with what they believe to be unlawful discovery orders and being held in contempt of court.

There are two reasons why petitioners' intrusiveness arguments cannot stand analysis. First, the discovery itself is very limited, consisting of just nine interrogatories and eight requests for production of documents with respect to a committee whose life was less than nine months. In the main, those discovery requests seek the basic information needed to determine the threshold question of whether non-government persons participated in the work of the Task Force and its sub-groups, and if so, in what manner and to what extent. The information sought is likely to be contained in portions of documents showing who was invited to meetings, who attended, who was sent drafts of the final report, and who commented on them. Not only would production of such records not be burdensome, but they could readily be redacted

to delete any arguably deliberative or otherwise privileged information.

Second, although the district court has allowed respondents to initiate discovery, the court has been clear beyond a doubt that none of its orders will preclude petitioners from claiming any kind of privilege or arguing that particular requests are too broad or too burdensome to be required to answer fully. All that the district court ruled was that petitioners' across-the-board refusal to respond to all discovery is not proper. The district court has emphasized its willingness to limit discovery or utilize *in camera* procedures, if necessitated by any undue burden on petitioners, and its readiness to entertain any specific objections or privilege claims by petitioners. JA 247-48, 288-92, 405. Therefore, none of petitioners' claims of excessive discovery is even ripe, let alone well-taken.

Nor do petitioners fare any better on the second essential prong of their request for interlocutory review. They seek to equate the discovery orders here with the order to President Nixon requiring him to turn over tapes of some of his conversations to the grand jury. In *United States v. Nixon*, 418 U.S. 683 (1974), this Court ruled that no order actually holding the President in contempt was necessary to obtain appellate review of the production order where a contempt order was the only step required to perfect his appeal. Here, by contrast, the discovery process has just been allowed to start, and no one, let alone the Vice President, is anywhere close to being sanctioned, not to mention being held in contempt of court.

Even if petitioners were to persist in their refusal to comply with the discovery orders, a whole range of non-contempt sanctions would be available under Rule 37(b) of the Federal Rules of Civil Procedure. For example, a court could enter a default judgment against petitioners, from which they could then take an appeal and have all their claims about discovery and the failure to grant their motion to dismiss heard. Indeed, in *United States v. Armstrong*, 517 U.S. 456 (1996), a

case relied on by petitioners in their merits argument (Br. 23), a district court ordered discovery against the United States in a criminal case on the issue of selective prosecution. When the Government refused to comply, the indictment was dismissed, and the discovery issue was resolved in the Government's favor on its appeal from the final judgment dismissing the case. Far from being "completely unreviewable," petitioners' discovery arguments can be heard on appeal though this well-established means, should they persist in their current position. Moreover, there is no substantial risk that they will be held in contempt or have to comply with the discovery order before that review can take place. Thus, whether the request for interlocutory review is based on the collateral order doctrine or mandamus, its essential predicate -- the absence of other adequate means of obtaining review of the order being challenged -- is lacking.

In fact, petitioners' fundamental claim has nothing to do with the breadth or intrusiveness of discovery or the divulging of privileged information. Rather, it is that "*any* discovery . . . in the context of the record in this case would violate the separation of powers" (Br. 41, emphasis in original). Had the case run its course in the district court, petitioners' demand that there be a halt to all discovery would have made it easier to proceed to the next steps under Rule 37 and that would have enabled petitioners to take that clean issue promptly to the court of appeals once a final judgment had been entered. And their no-discovery position further shows that their claim that the allegedly intrusive discovery here is tantamount to relief on the merits is irrelevant to their legal arguments.

Petitioners' arguments on the merits, which occupy three-quarters of their brief and which precede the jurisdictional arguments that the court of appeals found dispositive, should also be rejected. Each of petitioners' claims has far-reaching implications, and the court of appeals has passed on none of them. Therefore, should the Court accept any of petitioners' jurisdictional claims, it should remand the case to the court of appeals to allow it to consider these questions in the first instance.

In any event, petitioners' merits arguments rest on no firmer ground than do their jurisdictional claims. All of them are essentially claims that the district court erred in not granting petitioners' motion to dismiss, which is the classic non-final order for which interlocutory review is never available except under the collateral order doctrine. Moreover, mandamus requires a showing of a "clear and indisputable" right, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988), and none of petitioners' arguments has any precedent to support it that rises to that level.

Their contention that a court may look no further than the order establishing an advisory committee to determine whether it is "composed wholly" of federal officials, and hence is exempt from FACA, is an open invitation to massive evasion of FACA, not just for Presidential committees, but for those established by federal agencies since the same exemption applies to all committees. It would even apply to sub-groups that operate at a considerable distance from the main committee and hence raise none of the separation of powers concerns on which petitioners place such emphasis.

Petitioners' claim that no discovery is available in this case is simply to say that almost no one will have an enforceable FACA claim. Unlike other actions under the APA, where there are opportunities for interested persons to make a record at the administrative level and to gain some access to the evidence and arguments of the agency, here the Task Force and its sub-groups operated entirely in secret, with no opportunity for public input of any kind. If there can be no discovery in this case, there can be none in any FACA case, and the law will become essentially a dead letter.

Finally, petitioners argue that the application of FACA to the Task Force or its sub-groups would violate separation of powers. But as the district court recognized, that claim is premature because there may be no need to decide it. Thus, if petitioners' position that no private persons participated extensively in the work of the Task Force or its sub-groups is

sustained, they will prevail on the merits of their statutory exemption. Furthermore, as *Nixon v. General Services Admin.*, 433 U.S. 425, 443 (1977) requires, the outcome of the separation of powers balancing test will almost certainly be affected by the facts found, and yet discovery has not yet begun. But as the record stands, there is no basis for finding that applying FACA here would not satisfy that test.

Moreover, this Court has long held that constitutional claims should be decided as a last resort, not, as petitioners urge here, before a court determines whether the case can be resolved on statutory or other grounds. This case is unlike *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), in which three Justices found the application of FACA unconstitutional on the facts stipulated in that case. However, in *Public Citizen* there was a final judgment, and the three Justices concluded that FACA, as they interpreted it, did not allow them to avoid the constitutional issues presented. Whether any court will find it necessary to reach the constitutional issues in this case is unclear, but it is clear that there is no reason for any court to reach them now.

ARGUMENT

Introduction

Petitioners' principal objection to the decisions of the district court is to the discovery that it authorized. Their first question presented calls the discovery "broad," and their brief refers to it, in ever-escalating adjectives, as "wide-ranging" (Br. 38), "relatively unbounded (Br. 39) "sweeping" (Br. 40), and "intrusive" (Br. 41), not to mention "intrusive, invasive, and burdensome" (Br. 21). The question presented also claims that the discovery would intrude into "the process by which the [Task Force] gathered information to advise the President," (Br. I), incorrectly suggesting that, even at the preliminary stage of the litigation, the district court has allowed respondents to probe the thinking of the Task Force members ("force the opening of sensitive Executive Branch deliberations"- Br. 10)

as they compiled their recommendations.[2] Petitioners' claims with respect to the discovery allowed are crystallized in their oft-repeated assertion that the discovery that the district court permitted, simply to determine whether FACA applies, is "tantamount to relief for a [FACA] violation" (Br. 41).[3]

Despite this bluster, petitioners' own brief concedes – indeed embraces – the proposition that it is not the breadth of discovery to which they object, but any discovery at all, to the point where they refused to make specific objections or raise any claim of privilege. According to petitioners, "*any* discovery – let alone discovery tantamount to relief for a violation – in the context of the record in this case would violate the separation of powers" (Br. 41, emphasis in original).[4] To be sure, at some points in their brief, petitioners are less than clear as to whether their "no discovery" rule applies just to the Vice President and other staff assigned to the Task Force, or whether Cabinet officers, who were Task Force

---

[2] *See also* Br. at 33 (Task Force cannot be required to "disclose the process by which the group developed recommendations for the President"); *id.* at 34 (Congress cannot "regulate the process .. . [or] intrude into that process"); *id.* at 42 (separation of powers precludes "all discovery into the process by which the President received advice [from the Task Force]"); *id.* at 36 (discovery into "manner" of obtaining information); and *id.* at 45 ("details of the process").

[3] *See also id.* at 9 ("discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself, in order to determine whether FACA even applies"); *id.* at 20-21 (discovery "at least as intrusive as the disclosure obligations imposed by FACA itself"); *id* at. 37 ("discovery obligations roughly co-extensive with the available remedies for a FACA violation"); *id.* at 39 ("remedy for a proven FACA violation is not materially different from a discovery order"); and *id.* at 41 n. 7 ("discovery order [ ] mirrors the relief provided for a [FACA] violation").

[4] *Id.* at 42 (separation of powers precludes "all discovery" in this case); *id.* at 45 (district court should have resolved case "without any discovery"); *id.* at 47 ("the very essence of petitioners' separation-of-powers objections is that *any* discovery against the Vice President and immediate assistants to the President" is unconstitutional) (emphasis in original).

members, and agency staff would be permitted to provide discovery concerning the Task Force and its sub-groups. But the overall thrust of their position is clear, and indeed necessary to sustain any arguable claim for interlocutory review: no discovery should have been granted. Thus, it borders on the disingenuous for petitioners to seek to paint a picture of a district judge run amok since their legal claim is that, even if the judge ordered only the production of lists showing attendees at meetings of the Task Force and its sub-groups, that would have been improper.[5]

Moreover, the district court did not authorize any discovery remotely resembling what is alleged in petitioners' brief. The court-directed joint discovery plan submitted by respondents on July 19, 2002, is very short. JA 160-163. On August 2, 2002, the district court approved the plan and nine interrogatories and eight requests for production of documents, totaling less than 5 printed pages, after instructions and definitions are excluded. JA 215-229. In the main, this discovery seeks only basic information about who, other than government officials, participated in the activities of the Task Force and its sub-groups. Respondents' discovery could be largely answered by staff producing documents, such as minutes of meetings, lists of invitees or attendees, and cover memoranda showing to whom drafts were sent and/or from whom comments were received, none of which would reveal internal deliberations. Nonetheless, petitioners go so far as to suggest that the President, who is not even a party, may be the subject of discovery in this case (Br. 24, n.2). Given this record, it is difficult to fathom the basis on which petitioners contend that the "decisions below impose intrusive and

---

[5] The second question presented also asserts that the discovery orders here are "unprecedented," a charge repeated in the body of the brief at 39-40 and 45. Here too the Government's hyperbole has gotten the better of it: petitioners may disagree with the discovery permitted below, but it is precisely the same kind of discovery that the court of appeals allowed with respect to the sub-groups in *AAPS*. 997 F.2d at 901, 915-916. However one might characterize the discovery allowed here, it is surely not "unprecedented."

distracting discovery obligations on the Vice President himself" (Br. 38-39). *Compare Clinton v. Jones*, 520 U.S. 681 (1997) (allowing discovery that could only be answered by sitting President).

Of course, at some point discovery could seek additional information, perhaps even privileged materials, but the district judge has made it clear that there will be "a very tightly-reined discovery process" (Pet App. 118a), and that he remains open to pass on all claims of privilege or any specific objections petitioners might have. JA 288-292, 405. The court of appeals even suggested that the discovery requests as written may be overbroad (*see* note 1, *supra*). However, since petitioners had made no request to narrow them, that could not be a basis for issuing a writ of mandamus. In short, the record is clear both that petitioners contend that any discovery is impermissible and that respondents have made quite modest discovery requests to which petitioners have made no specific objections, no claims of privilege, and no particularized claims of burdensomeness or overbreadth.

I. THE COURT OF APPEALS LACKED JURISDICTION OVER THE QUESTIONS THAT PETITIONERS PRESENTED TO IT.

A. Petitioners' Claims Of Error.

The court of appeals did not reach the merits of petitioners' claims because it concluded that there was no final judgment and that, therefore, it lacked jurisdiction over the interlocutory appeals under either 28 U.S.C. § 1291 or appellate mandamus. Accordingly, this Court is also without jurisdiction. *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). However, in order to decide the jurisdictional questions, which this Court is required to decide first, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), we will briefly describe petitioners' claims.

Petitioners' merits arguments are really one argument:

the district court should have dismissed the complaint instead of allowing any discovery. In Point II, respondent will discuss the reasons given by petitioners for their conclusion, but for now they can be said to fall into three somewhat overlapping categories. First, the complaint fails to state a claim for relief under FACA because, in determining whether an advisory committee qualifies for the exception for committees composed wholly of federal officers and employees, the courts may look no further than the documents establishing the committee.

Second, even if the courts may look behind those documents to determine whether the exemption applies, petitioners assert that there is no right to any discovery or, in the alternative, that a plaintiff making such a challenge must present some unspecified quantity and quality of evidence – something more than "unsubstantiated allegations in a complaint" (Question Presented 1) – in order to survive a motion to dismiss. Their position is at bottom a contention that, in FACA cases, there is either no discovery or there is some form of heightened pleading or early proof requirement before any discovery can be allowed because, according to petitioners, this is principally an APA case, in which the claim is ordinarily decided on the administrative record, with no discovery allowed.

Third, as applied to Presidential committees, if the de facto membership doctrine applies, even to sub-groups such as were present in *AAPS* and are present here, FACA is unconstitutional as a violation of principles of separation of powers. The constitutional argument is an independent claim, but petitioners also rely on it to bolster their statutory arguments.

Importantly, petitioners overlook the fact that a substantial part of the complaint of respondent Sierra Club is directed at private participation in the groups subordinate to the Task Force. JA 146-153. This is significant both because petitioners' "administrative record" contains nothing regarding those sub-groups and because the discovery and separation of

powers concerns are much less significant the further away the process is from the Vice President and his immediate staff, as is alleged to be the case for the sub-groups. Yet despite the significance of these distinctions, petitioners' brief essentially disregards the allegations regarding the sub-groups.

B. The Court of Appeals Lacked Jurisdiction Under Section 1291.

In contrast to *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), there is no final judgment in this case. Thus, there was no basis for an interlocutory appeal unless an exception to the final judgment rule applied. Vice President Cheney and the non-agency petitioners tried to obtain certification under 28 U.S.C. § 1292(b) (JA 279-281), but the district court wrote a lengthy and thoughtful opinion explaining why interlocutory review was not appropriate. *Id.* at 383-415. Only the Vice President filed a Notice of Appeal, *id.* at 337-338, and he has not relied on a claim of absolute or even qualified immunity, based on cases such as *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), or *Mitchell v. Forysth*, 472 U.S. 511 (1985), although the brief describes his position as an "immunity" from discovery (Br. 42). Even assuming that the Vice President will ever have to personally respond to discovery, it is hard to imagine how that would violate the constitution, given this Court's decision in *Clinton v. Jones*, 520 U.S. 681 (1997), in which a sitting President was held not to be immune from extensive personal discovery in a private damages action. Furthermore, as this Court ruled in *Midland Asphalt Co. v. United States*, 489 U.S. 794, 800-801 (1989), the collateral order exception to the final judgment rule for claims of immunity is a narrow one, and it would not apply here.

Instead, the Vice President relies almost entirely on *United States v. Nixon*, 418 U.S. 683 (1974), which sustained jurisdiction under section 1291 and the collateral order doctrine. There are a number of reasons why the court of appeals did not have jurisdiction on that basis, with the first being that the appeal was not timely. The notice of appeal,

which was filed on November 7, 2002 (JA 9), purports to appeal from the orders entered on November 1, October 17, and September 9, 2002, in which case the filing would be within the 60 days provided by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure. Petitioners do not contest that the 60 days applies to collateral order appeals such as the Vice President's, and the cases so hold. *See e.g., Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990), *cert. denied*, 514 U.S. 1035 (1995); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992); C. Wright, A. Miller, & E. Cooper, 15A Federal Practice & Procedure § 3911 at 357 (1992).

The problem for the Vice President is that, based on his theory on the merits – the motion to dismiss should have been granted and hence no discovery should have been allowed – it was not the orders cited in the notice of appeal that finally determined that question, but the district court's order denying the motion to dismiss, which was entered on July 11, 2002. Even giving petitioner Cheney the benefit of the doubt, the district court's order approving the discovery plan and allowing respondents to serve their interrogatories and request for production of documents was entered on August 2, 2002 (*see* JA 3), and the notice of appeal was filed more than 90 days later. In fact, the appeal would still have been timely had it been filed immediately after the entry of the September 9th order, from which the Vice President eventually sought to appeal. What he could not do was to wait four months from the denial of the motion to dismiss, and then seek to take an interlocutory appeal from that adverse ruling.

The principal response in petitioners' brief to the staleness claim is that they did not forfeit their right to appeal the denial of their motion to dismiss by making further objections to the actual discovery orders (Br. 45). The response misses our point. Petitioners could have continued to object in the district court, as they did, but since their claim is that any discovery in these circumstances was improper, they had only 60 days from the time that some discovery became inevitable to file an interlocutory appeal. If the Vice President did not file

within that time, he would not lose his right to appeal from the denial of the motion to dismiss, but he (and the other petitioners) would have to wait until an adverse final judgment to do so.

Even if the appeal were timely, it would not be covered by the special circumstances that gave rise to an interlocutory appeal in *United States v. Nixon*, as the court of appeals properly concluded. There are four principal distinctions between *Nixon* and this case that explain why even a timely appeal from the July 11th order (or from any of the orders entered thereafter) would not fall within the *Nixon* rationale. First, the party opposing discovery in *Nixon* had already raised a procedurally proper claim of Executive privilege as to the specific tapes being sought, and that claim had been definitively rejected by the district court. Here, no claim of privilege for any document or for any answer to any question has been raised, let alone rejected. Second, President Nixon was not a party to the underlying proceeding before the grand jury. Therefore, there would be no other "final judgment" against him from which he could take an appeal, in contrast to this and other civil cases, in which the persons subject to discovery orders are parties to the underlying proceedings.

Third, the only other step needed to perfect the interlocutory appeal in *Nixon* was an order holding the President in contempt. In this case, however, the district court is several steps away from any possible contempt ruling. For example, on remand petitioners may choose to answer certain questions and produce unprivileged documents that may satisfy respondents, or the district court may conclude that such production constitutes sufficient compliance in this case. Or petitioners may file claims of privilege that the district court may sustain, or the privilege log or an *in camera* inspection may reveal to the district court that the information sought is not relevant or may be withheld for some other reason. As the Seventh Circuit recently observed in rejecting a writ of mandamus, "[i]nstead of trying to predict how the trial will play out, we defer review until the end, when we can see how

matters *did* play out." *In re Lewis*, 212 F.3d 980, 985 (2000) (emphasis in original).

Fourth, and most significantly, petitioners present this case as if the trial judge had already rejected all of petitioners' privilege claims and other objections applicable to particular documents or interrogatories and issued an order compelling petitioners to respond. They further assume that the judge would force the Vice President and perhaps others to comply with the order or be held in contempt, with jail and/or daily fines to follow, as day follows night. And if petitioners wished to avoid contempt, they would be compelled to comply, thereby mooting any claim that the discovery order was improper because the cat would already be out of the bag.

But the Federal Rules do not limit a trial judge's options in that way, nor do they result in procedures that deny parties resisting discovery a meaningful opportunity to obtain appellate court review of allegedly unlawful discovery orders. Rule 37(b)(2) provides for a wide range of sanctions short of contempt, such as (A) ordering that certain facts be taken as having been established for purposes of the case; (B) precluding a disobedient party from opposing certain claims or introducing certain evidence; or (C) striking parts of the pleadings or rendering a default judgment. Although respondents have asked the district court to impose sanctions against petitioners for their refusal to comply with discovery, the district court has declined to do so. More importantly, it is nothing short of premature speculation that the district court will choose a contempt option in lieu of other sanctions, if the discovery proceedings ever reach that point. *See United States v. Moussaoui*, 333 F.3d 509, 515-16 (4th Cir. 2003) (it is "not enough that the Government's noncompliance with the order is anticipated or even certain, especially when it is unknown what sanction, if any, may be imposed by the district court.")[6]

---

[6]Even in *Nixon*, where the only feasible remedy was contempt, this Court made clear that ordinarily it would require a person refusing to comply with

(continued...)

If one of the non-contempt sanctions were chosen, the worst that could happen to petitioners is that the district court would enter judgment that they had violated FACA and order them to comply by making certain disclosures. Even then, the status quo would almost certainly be maintained pending appeal because either the district court or the court of appeals would stay the disclosure portions of the order. *See Center for National Securities Studies v. Department of Justice*, 217 F.Supp. 2d 58 (D.D.C. 2002) (stays "routinely granted"); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (stay granted to avoid mootness). At that time, there would be an appealable final judgment, and as part of that appeal, petitioners could ask the court of appeals to review the previously non-reviewable order of July 11, 2002, as well as any other interlocutory orders, such as any sanctions under Rule 37(b), that would merge into the final judgment. That is precisely what happened in *United States v. Armstrong*, 517 U.S. 456 (1996), where the district court dismissed an indictment when the Government refused to respond to discovery on the issue of selective prosecution, and the Government obtained a reversal of the discovery order when it appealed the final judgment against it.

Thus, far from denying petitioners an appeal over discovery and other orders that they consider unlawful, the district court has provided more than ample procedures that assure that petitioners will ultimately have the right to one appeal, from a final judgment, that includes any otherwise

---

[6](...continued)
a discovery order to be held in contempt, but that insisting on such a requirement for the President would be "peculiarly inappropriate due to the unique setting in which the question arises." 418 U.S. at 691. As the D.C. Circuit has pointed out, relying on Winston Churchill, there is a vast difference between the number one person and those immediately under him. *In re Papandreou*, 139 F.3d 247, 251 n.1 (1998). *See also Clinton v. Jones*, 520 U.S. 681, 698 (1997) (pointing out unique roles for President, most of which are inapplicable to the Vice President).

non-moot order made along the way. Petitioners are simply mistaken in the assertion that, if the decision below is sustained, "the only way that the Vice President [or anyone else] can obtain appellate review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery on remand, submit to the indignity of a contempt citation, and appeal the contempt citation" (Br. 44 emphasis in original). What has actually happened is that petitioners have interrupted the orderly process for resolving civil cases against the Government by seeking writs of mandamus and taking an interlocutory appeal of non-final orders, instead of either answering the discovery, or standing on what they believe to be the correct view of the law and allowing the court of appeals to decide whether they are right once a final judgment has been entered against them.

To be sure, if petitioners were to follow the path of insisting on their no-discovery position, and the district court entered a preclusion order, they would run the risk that the court of appeals might disagree with them on the merits. In that case they would lose the opportunity to answer the discovery and then perhaps prove that, in fact, private persons were not de facto members of the Task Force and/or its sub-groups. But that is the inevitable consequence of the final judgment rule and the operation of Rule 37(b) in cases where a party refuses to respond to discovery, whether on principle or for any other reason. Petitioners are represented by sophisticated counsel, and they will surely be advised of the consequences of their choice once the case is back in the district court. But if they decide to answer the discovery, and not continue their massive resistance, the choice to forgo their appellate rights on the discovery, but not the merits, issues, will be theirs. Unlike *Nixon*, it is not "now or never" for appellate review, nor is there any immediate or even any realistic possibility that the Vice President or any other defendant will "be required to submit to contempt proceedings before obtaining appellate review of" their claims that there was no basis for ordering discovery (Br. 11). Therefore, even if the appeal here had been timely, there would be no basis to apply the collateral order doctrine to

rescue the Vice President from the choices that he will have to make in the district court on remand.

Petitioners' principal response is that the court of appeals rejected their jurisdictional claims only because petitioners had not raised a claim of Executive privilege in the district court, thereby making any appeal premature (Br. 40-43). We do not read the opinion below in that limited way (Pet App. 24a), but we agree with petitioners that the presence (or absence) of a claim of Executive privilege is neither a necessary nor sufficient basis for an exception to the final judgment rule. Surely, the jurisdictional issue in *United States v. Nixon* would have been resolved in the same way if the privilege being asserted were attorney-client or spousal. Conversely here, if the Vice President had also raised a claim that some of the materials sought in discovery were privileged, but no orders beyond those issued by the district court here had been issued, there would still be no interlocutory appellate jurisdiction because he would not yet be in realistic danger of being forced to comply with a discovery order or be held in contempt of court. But the fact that there is no claim of Executive privilege only underscores why discovery should proceed and why there is no basis for appellate court intervention at this time.[7]

C. There Was No Mandamus Jurisdiction in the Court of Appeals.

The court of appeals also lacked mandamus jurisdiction over petitioners' attempt to obtain interlocutory review of the district court's refusal to dismiss the complaint before allowing respondents any discovery. Once again, as with the attempt to use the collateral order doctrine to obtain an appeal, mandamus was either too late or premature. To the extent that mandamus

[7] Respondent is at a loss to understand the basis on which petitioners purport to rely on this Court's decision in *Public Citizen, supra*, on the jurisdictional issue (Br. 39), since that case involved a final decision in the district court, followed by a direct appeal to this Court. 491 U.S. at 448.

might lie over a denial of a motion to dismiss, the writ should have been filed promptly after the July 11, 2002 order was entered and not months later. Although FRAP Rule 4(a) does not apply to mandamus petitions, the absence of a specific limitations period for mandamus relief does not permit petitioners to evade the 60-day rule by recasting their appeal as a writ of mandamus. *Helstoski v. Meanor*, 442 U.S. 500, 508 n.4 (1979).

Prohibiting such evasion is particularly appropriate here where, if any review is proper at this stage of the case, it is because the order being reviewed is similar to orders falling within the collateral order doctrine. *Id.* at 505-06 (mandamus available only when there is no other practical remedy). As petitioners admit, and indeed embrace (Br. 40), they did not seek mandamus on the ground that the lower court ordered them to provide specific information that is subject to Executive privilege or otherwise exempt from discovery. Rather, they sought a much "broader and antecedent" form of discovery immunity (Br. 42) – a claim that would be reviewable at this stage only if it fell within the collateral order doctrine, which is subject to the 60-day rule.

Even if the 60-day rule did not apply, petitioners' mandamus claim should be barred by laches. *In the Matter of the Eastern Cherokees,* 220 U.S. 83 (1911). For nearly four months after petitioners knew that discovery was inevitable, they continued to delay and obstruct the proceedings in an effort to postpone having to respond or even object to specific items of discovery. So successful were they that, more than a year and a half after they were directed to provide documents and answers to interrogatories, the non-agency petitioners have not produced a single piece of paper, responded to a single interrogatory, or even provided a single specific objection to any of respondents' discovery requests. And the voluminous documents that the agency petitioners have provided are virtually useless in determining the extent of private party involvement in the workings of the Task Force and its sub-groups. *See* note 18 *infra*. Instead, petitioners waited four

months before going to the court of appeals on a claim that, on petitioners' theory, was as ripe as it would ever be on July 11, 2002. It has always been clear to all parties and the lower courts that respondents seek access to information about what roles private parties played in the work of the Task Force and its sub-groups. By their tactics, petitioners have significantly thwarted the efforts of respondents to reach the merits and eventually to make that information public. If there were ever a case for applying laches to a request for a writ of mandamus to the district court, this is surely it.

As with the collateral order argument, the crux of petitioners' mandamus claim is that, if interlocutory review is not forthcoming now, review at the end of the case will be meaningless. The same reasons that demonstrate why petitioners' defenses will not become moot, nor will they be forced to be held in contempt, apply equally whether the basis for appellate jurisdiction is the collateral order doctrine or mandamus, and we will not repeat those reasons here.

Furthermore, even if this dispute were truly about discovery and not a claimed immunity, there would still be no basis for mandamus in the court of appeals because there is no order compelling specific discovery that might arguably form the basis for such a writ. Petitioners cite no authority for the proposition that orders rejecting blanket objections to discovery are properly the subject of writs of mandamus in the courts of appeals or of claims of immunity of any kind, let alone the unique variety asserted here. Even if mandamus might be available to protect against the violation of a claim of privilege with respect to a specific disclosure, which has not yet occurred, it has never been invoked in this situation in which petitioners seek to use the writ as an end-run on the prohibition against interlocutory appeals of discovery orders.

Finally, mandamus also must be rejected because it puts the cart before the horse. To be entitled to mandamus, a party must establish a "clear and indisputable" right, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289

(1988). Yet there is no authority creating an immunity from discovery of the kind sought here, and hence no basis for a court of appeals to find that a district court has acted in clear derogation of such a non-existent rule of law. At the very least, the failure of the district court to interrupt discovery before petitioners have even filed a single specific objection is not clear error as to warrant the use of mandamus, particularly since petitioners will be able to obtain full appellate review of their legal claims after entry of a final judgment in the district court.

* * *

Petitioners' jurisdictional arguments are less an attempt to show why section 1291 or mandamus applies, and more an effort to convince the Court that an appellate court *ought* to step in now because the district court was wrong in not dismissing the case and wrong in allowing any discovery, and those errors, in petitioners' view, rise to the level of violations of principles of separation of powers. That is the kind of argument that the law allows a party to present to a district court as a basis for discretionary review of an interlocutory order under 28 U.S.C. § 1292(b), and indeed petitioners made such an argument, but the district court firmly rejected it. JA 383-413. Congress has made the choice that decisions of district courts are not appealable until there is a final judgment, unless a specific exception applies, in order to discourage "piecemeal litigation." *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976); *United States v. Nixon*, 418 U.S. 683, 690 (1974) (noting "strong congressional policy against piecemeal reviews" and observing that following the final judgment rule "ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation.")

As respondent has demonstrated, neither mandamus, collateral order, nor any other exception applies, and therefore it is wholly irrelevant to the jurisdictional question whether the district court was in error and even whether any error was a constitutional one. There are more than ample means by which

petitioners can preserve their legal arguments, without providing the requested discovery or being held in contempt of court, if they choose that path. What they cannot do is obtain appellate review of the decision to deny the motion to dismiss when none of the exceptions to the final judgment rule applies, simply because they are making separation of powers claims in support of their position. In any event, as we now show, petitioners' claims of error on the merits are as flawed as their jurisdictional arguments.

II. THE DISTRICT COURT PROPERLY DENIED PETITIONERS' MOTION TO DISMISS.

Although petitioners mainly object to the discovery allowed against them, the only legal basis on which the district court could have denied respondents any discovery would have been to dismiss the complaints. Thus, assuming some basis for interlocutory review, the question presented on the merits is whether respondents' complaints should have been dismissed without allowing them any opportunity to prove their case. To support that contention, petitioners raise three arguments that we address in turn.

A. The Document Establishing an Advisory Committee Does Not Conclusively Determine Its Membership.

Assuming that this Court finds that there was jurisdiction in the court of appeals, it is surely open to this Court to remand the case to that court for its initial consideration of the merits. That option has particular appeal on the de facto membership issue because it is the D.C. Circuit's prior decision in *AAPS* on which respondents relied in filing their complaints and on which the district court relied in denying the motion to dismiss.

If the Court decides to consider this issue without the benefit of the views of the D.C. Circuit, the fact that the case is on interlocutory appeal, under an exception to the final

judgment rule, bears on the light in which the district court decision should be viewed. Thus, if interlocutory review is based on mandamus, which is the only basis for review for anyone except the Vice President, that writ is available only if there is a "clear and indisputable" right to the relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). Thus, on mandamus, the issue would not be whether the district court was right or wrong, as it would be if an interlocutory appeal were granted under section 1292(b), or if there were a final judgment with an appeal under section 1291, but only whether the district court committed plain error in failing to dismiss.

This distinction is important in this case because, at the time that the district court denied the motion to dismiss, the law as to de facto membership in federal advisory committees, and its impact on the right to claim the exemption for committees composed solely of federal officials, was clearly established by *AAPS*. That decision held that, if there were private members of the sub-groups there, whose roles were "functionally indistinguishable" from those of designated members, the exemption was lost, even though all of the members of the main committee were federal officials. 997 F.2d at 915. To be sure, the defendants in *AAPS* did not contest that the allegedly non-government persons were working on the sub-groups, but instead argued that in fact they were federal officers. Nonetheless, the underlying principle of *AAPS* is that what actually happens with an advisory committee and its sub-groups determines the applicability of FACA, and not merely what the documents that formed the committee say.

Petitioners argued in the district court that *AAPS* did not create a de facto membership doctrine and that nothing in it allowed a court to go beyond the face of what the federal officials said was being done and who was a member of the committee. That is a conceivable reading of *AAPS* only because the court of appeals there was not directly confronted with a claim that persons other than those officially stated to be members were acting as members. But even Judge Randolph in

his dissent in this case thought that respondents and the district court properly read *AAPS* (Pet. App. 35a), which is why he would have overruled it. *Id.* at 44a-45a. At the very least, the contrary position – that it was "clear" that there is no such doctrine under FACA as de facto membership – was not the law in July 2002 when the motion to dismiss was denied. Therefore, because interlocutory review under mandamus provides the standard of review on the merits, there was not such "clear error" as to grant mandamus relief. Put another way, it is one thing for district courts to be reversed after final judgment when a higher court disagrees on the merits, but their decisions should not be set aside on mandamus unless they are plainly wrong under existing law, which is surely not the situation here. Otherwise, there would be no difference between mandamus and direct appeal after a final judgment, except that the former would be available sooner than the latter, and, very quickly, there would be little left of the final judgment rule. *In re Papandreou*, *supra*, at 250 (warning against undue expansion of mandamus jurisdiction that would circumvent bounds of collateral order doctrine).

Even viewed de novo, the answer to the question of whether FACA should be construed to include de facto membership, or only formally designated membership, favors inclusion of de facto members. The exception relied on by petitioners excludes "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government" (5 U.S.C. App. 1, § 3 (2) (Pet. App. 127a)). There are two words in section 3(2) that support the de facto interpretation. The first is "composed." According to Webster's Third New International Dictionary (1993), and using the meaning of "compose" closest to this context, composed means "to form the substance of: CONSTITUTE. now used chiefly in the passive < a soup is *composed* of many ingredients>." Surely, if one wanted to know what a soup was composed of, one would not just look at the recipe, but would ask what the chef put in the pot. The use of composed is also important because it contrasts with the term "established" used in that same section to describe the creation of advisory

committees. Using "established" in the exemption would have been proper if Congress wanted to focus solely on who was named to the committee, and not who actually provided the advice and recommendations, *i.e.*, "any committee that is *established* wholly" with federal officials or "any committee that is wholly *established*" with federal officials.[8]

Second, the inclusion of the term "wholly" appears largely superfluous except to emphasize that the exception is narrow. If "wholly" were not included, the natural reading of the exemption would still be that it was available only if 100% of the committee were qualifying federal officials, and that even one non-federal person would destroy the exemption.[9] Thus, to deny the de facto membership doctrine would require a court to assume that, although Congress denied an exemption if the formal membership of a committee had one non-federal official out of a membership of 25, the same exemption would be kept if there were 100 private persons regularly participating in the work of an advisory committee, so long as they were not formally designated as members by the official who established the committee. Such a result may not be absurd, but it is far from the natural reading of this language, and it is difficult to see how it fits with one of the core purposes underlying FACA, which is to help assure that the advice that federal officials receive is balanced and does not come entirely from "special interest groups." H. Rep. No. 1017, *supra,* at 6; *see generally* Brief Amicus Curiae of Natural Resources Defense Council

---

[8] Petitioners place great reliance on the use of "established," contending that it requires the Court to focus on what the President did at the outset. Respondent agrees that the creation of a committee has significance, but not to the exclusion of the committee's operation, which is petitioners' view. Since "established" deals only with the former, it cannot be dispositive unless the Court accepts the notion that FACA is blind to what the committee does once it begins its work.

[9] There is a further limitation that such officials must be "full-time or permanent part-time" federal officials, so that special government employees and even state officials could not be members for the exemption to remain. This limitation provides further evidence that the exemption is narrow.

("NRDC Brief") at 4-6. That goal would be undermined if, as respondents have alleged, the committee was populated by persons having a decided bias in their outlook – here the energy industry – with no input from the other side.

This case involves a presidential committee, but the exemption applies to all federal advisory committees, most of which are established by agencies, not the President. Therefore, to deny the de facto membership doctrine would create a potentially gigantic loophole for every agency in the federal government, as petitioners seem to acknowledge – "de facto member doctrine … requires a court to disregard the Executive's [not just the President's] own description of its committee" (Br. 20). Congress passed FACA because it wanted closer supervision of advisory committees, but if agencies know that no court can go behind the formal designation of a committee's membership to determine even whether FACA applies, that will provide a huge opportunity to render FACA almost meaningless. That effect is even more pronounced because petitioners claim that even the sub-groups of the Task Force, on which the Sierra Club has focused its attention, are also not subject to the de facto membership requirement.

The Task Force here operated in almost complete secrecy, and its report was issued less than four months after its creation. As a result, there was little opportunity to gather direct evidence of the role of private parties in its operation, but that will not always be the case. The involvement of what the plaintiffs in *AAPS* contended were private parties was not in dispute, although their legal status was. Suppose in this very case, respondents had obtained a sworn affidavit from someone on the Task Force that stated that "ten energy industry executives regularly participated in all the meetings, regularly received drafts of the report and recommendations, and regularly submitted comments on those drafts, which staff often accepted." If petitioners are correct in their statutory interpretation, the district court would have had no choice, even in that situation, but to grant a motion to dismiss because such

an affidavit would be legally irrelevant. However, as this Court has observed recently in two constitutional cases, the law does not allow to be done indirectly that which it forbids from being done directly, where there is no functional difference between the two situations. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995), and *Clinton v. City of New York*, 524 U.S. 417, 442 (1998).

Respondent recognizes that a committee does not lose its exemption by seeking the advice of private persons of its choosing. What the Government may not do and retain the exemption is, for example, to permit private parties to participate in the committee deliberations or drafting of recommendations in roles that are indistinguishable from those of formally designated committee members. Thus, on remand, it will not be enough for respondents to show that the Task Force and its sub-groups received extensive input from the energy sector (even though it received none from environmental groups or consumers); respondents must also show that private persons actively participated in the preparation of the collective advice of the Task Force or its sub-groups.

As the Fourth Circuit observed in a portion of an opinion quoted by this Court, if an administrative proceeding "'walks, talks, and squawks very much like a lawsuit,' it should be treated like a lawsuit for 11th Amendment purposes." *Federal Maritime Comm'n v. South Carolina Ports Authority*, 536 U.S. 743, 751 (2002), *quoting* 243 F.3d 165, 174 (2001). If a committee established to render advice to the President or a federal agency, walks, talks, and squawks like a non-exempt advisory committee, save for the formal designation of its membership, it should be treated as if the de facto members were formally designated to be on the committee and the exemption is lost.[10]

---

[10] Petitioners rely on a General Services Administration regulation (actually an "administrative guideline," *see* FACA § 7(c)), that was in effect while the

(continued...)

B. There Are No Special Hurdles for a Plaintiff to Overcome In Order to Obtain Discovery in a FACA Case.

In contrast with the prior argument, for which there is some language in FACA that provides some guidance, there is nothing in FACA at all that suggests that it limits the circumstances under which a plaintiff can obtain discovery. Undaunted, petitioners argue that since this is principally an APA case, and that ordinarily in APA cases there is no discovery, there should be no discovery here. Instead, they argue, the district court should have decided the APA claims on the administrative record. They make similar contentions for the mandamus claim under section 1361, although they do not identify an ordinary practice under that statute. Petitioners argue that, at the very least, before discovery can be allowed in a case like this, a plaintiff must make a special showing of some unspecified kind, presumably more than what petitioners' first question describes as "an unsupported allegation in a complaint." *But see Leatherman v. Tarrant County*, 507 U.S. 163 (1993) (courts not free to impose heightened pleading requirements except as provided by rules or statutes).[11]

---

[10](...continued)
Task Force was doing its work, which focuses on the appointment of the members. Br. 15, n.1. That guideline, which was first mentioned in this case by Judge Randolph in his dissent (Pet. App. 42a), was amended in August 2001 to be consistent with *AAPS*, and now defines a committee member as one "who serves by appointment or invitation," which is essentially our position. *Id.* This Court in *Public Citizen* gave little weight to a different GSA regulation, and under these circumstances respondent suggests that no weight be given to either version of the guideline, except to note that the current version is an appropriate exposition of the de facto member position.

[11] The complaint of respondent Judicial Watch, but not that of the Sierra Club, alleged a private cause of action based on FACA, but the district court dismissed that portion of the complaint. Pet. App. 73a-77a. Because there is no final judgment, that ruling was not before the court of appeals. As a practical matter, the only reason to allow such a claim is that any discovery

(continued...)

According to petitioners, the administrative record includes the presidential memorandum establishing the Task Force and Task Force's final report, both of which list only federal officials as members, but neither of which sets forth the membership of the sub-groups, which is a major focus of the Sierra Club complaint. In some places in their brief, petitioners suggest that the record would also include the letter from a lawyer for the Task Force, simply asserting that there were no private members, and an affidavit from a Task Force staff member, Karen Knutson, in which she makes similar, although more detailed assertions. The Knutson affidavit, which petitioners invoke on at least four separate occasions (Br. 6-7, 9, 23 n.2, & 26), was prepared during the litigation and was not even submitted until September 3, 2002 (JA 4), nearly two months after the district court denied the motion to dismiss. Timing aside, the rule that petitioners wish to establish seems to be that, if a defendant wishes to supplement, or confirm, the facts in the administrative record, the APA allows that, but if a plaintiff wishes to discover facts that are not discussed in the existing record, the APA forbids that. Petitioners cite no

---

[11](...continued)
limits imposed by the APA would not apply to a direct action under FACA. As we explain in the text *infra*, discovery is essential to prove most FACA claims, whether allowed under the APA or a direct or mandamus action. For this reason, respondents do not concede the correctness of the district court ruling, but do not contest it in this Court. In this connection, we note that section 10(b) of FACA (Pet. App. 133a) makes available records of all advisory committees, subject to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), in turn, contains a provision for de novo review of denials of requests for records (§ 552 (a)(4)(B)), which is one of the requests in both complaints. Therefore, it seems quite plausible that a claim under FOIA for records of the Task Force would be entitled to the same de novo review, including on the threshold question of whether the Task Force is an advisory committee and hence whether section 10(b) applies. Again, that argument was not made in the district court, but could be made on remand. In any event that issue is not before this Court, except as an additional reason for this Court not to decide the discovery issue, assuming the Court has jurisdiction at all.

authority for that proposition, undoubtedly because there is none that would support such a fundamentally unfair rule. If their case must rest on "the administrative record," then that record consists solely of the memorandum creating the Task Force and its final report. Or, as the D.C. Circuit put it in the context of evaluating the impact of ex parte contacts on an FCC proceeding, "even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable." *Home Box Office v. Federal Communications Comm'n*, 567 F.2d 9, 54 (1977).

Respondent does not disagree that discovery is not available in most APA cases, but the reasons for that practice do not apply in this case and many, if not most, others based on FACA. In formal rulemakings or adjudications, conducted under 5 U.S.C. § 556, the proceedings are "on the record," which eliminates the need for discovery, let alone additional evidence. The same is true of other non-556 adjudications, such as those conducted by the Social Security Administration or the Immigration and Naturalization Service. Similarly, in informal notice and comment rulemaking under 5 U.S.C. § 553, although the record is less defined than in adjudications, there is no basis to go beyond that record.

Even in informal adjudications, to which the proceeding here is most analogous, there is typically an administrative record of some kind that formed the basis of the decision. Thus, in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the "record" on which the agency was supposed to make its decision included submissions by the City, which wanted the highway, and by the objectors, who did not, as well as whatever materials the agency and other interested persons had produced. The so-called "gap" in that case was not in the facts that led to the decision, but in the reasons that the Secretary approved the location of the highway in the face of the objections made by the plaintiffs. But even *Overton Park* recognized that de novo review (which would inevitably involve discovery) is available where "the agency's factfinding

procedures are inadequate" or "when issues that were not before the agency are raised in a proceeding to enforce non adjudication agency action." *Id.* at 415. The Court there rejected do novo review principally because "there is an administrative record that allows the full, prompt review of the Secretary's action." *Id.* at 419.

By way of contrast here, neither respondent, nor any other member of the general public, had any input into the "decision" that the Task Force and its sub-groups were exempt from FACA because they were composed wholly of federal officials. There was no proceeding of any kind, regardless of the level of formality, by which their views could be heard, nor was there any opportunity to see the evidence on which the exemption decision was made, let alone an opportunity to contest it at the administrative level. The reason why courts in APA cases generally do not allow discovery, and hence supplementation of the record, is that the objecting party generally has had a full opportunity to make its position known to the agency, and it is the decision of the agency that is under judicial review. As *Overton Park* makes clear, when there has been a proceeding before an agency, however informal it may have been, it is not the job of the courts to make an independent determination on the issue, but to review what the agency has done.

Plainly, that rationale has no applicability to this case. Respondents had no opportunity to make legal arguments or present evidence on the issue before the Task Force, and they surely had no opportunity to attend meetings of the Task Force and /or its sub-groups so that they could offer direct evidence in the district court as to who was present and in what capacities they served. Indeed, the whole point of the asserted exemption was to enable the Task Force to operate in secret so that outsiders could not learn the extent of industry involvement in its operations. Under these circumstances, it is noteworthy how much respondents were able to learn and include in their complaints, even if what they have produced would not be

admissible in court. JA 43-138 & 145-148.[12]

Even the general practice of not having discovery in APA cases has exceptions, principally in circumstances where the party wishing to introduce additional evidence did not have a reasonable opportunity to do so at the administrative level. Thus, in a series of cases in the D.C. Circuit, dealing generally with the issue of whether ex parte discussions with the agency decision-maker improperly affected the process, the court of appeals has gone outside the administrative record to enable it to perform its mission. *See e.g., Professional Air Traffic Controllers Org. v. Federal Labor Relations Authority*, 685 F.2d 547, 556-557 (D.C. Cir. 1982); *Home Box Office v. Federal Communications Comm'n*, 567 F.2d 9, 51-53 (D.C. Cir. 1977); and *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). The *Air Traffic Controllers* case was an on the record adjudication, and the others were rulemakings, although conducted on a quite judicial-like basis. Yet in all three cases, and others, the court allowed the APA record to be supplemented because the issue of ex parte contacts had not been vetted at the administrative level. That is precisely the situation here with respect to the federal officials exemption, and these cases show that petitioners' "no-discovery in APA cases" rule is nowhere near as firm as they suggest and does not apply, as here, where the district court specifically found that discovery was necessary because "the administrative record [offered by petitioners] is 'so bare that it prevents effective judicial review.'" JA 411

[12] Their allegations have been confirmed by former Treasury Secretary Paul O'Neill in the recently published book by Ron Suskind, *The Price of Loyalty* (Simon & Schuster, 2004), in particular at pages 153-156. The most telling statement is on page 154: "'This is a slaughter,' said [former EPA Administrator Christie] Whitman to O'Neill after one meeting. 'It's ten on two, not counting White House people and all the advisers to the group from the various industries.'" Under petitioners' theory, respondents would also be barred from deposing Ms. Whitman and Mr. O'Neill to amplify their statements, although neither is any longer in the Government.

(citation omitted).[13]

Petitioners' alternative argument – that some kind of proof is needed before discovery can be commenced – is also without basis in the APA or the Federal Rules of Civil Procedure. *See Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (court may not use "blunt instrument" of creating rules limiting discovery, absent statute or rule authorizing it). We leave to one side the issue of how much more proof is needed before discovery is allowed, or how that is measured. Instead, the Court should reject this contention because none of the cases on which petitioners rely (Br. 23), all of which involve the "presumption of regularity," arise in contexts remotely similar to this case. One was a criminal case in which the defendant sought to go behind a decision to prosecute based on a suspicion of selective prosecution.[14] Another involved an adjudication before the Merit Systems Protection Board,[15] another sought third party discovery of the tapes of former President Nixon in a civil damages action against a former Attorney General,[16] and the last one involved a formal hearing on an occupational safety complaint where the defendant sought to subpoena top agency officials regarding their discretionary enforcement decisions.[17] Whatever the legal rules enunciated by those decisions, they have no bearing on this FACA case under the APA and 28 U.S.C. § 1361.[18]

[13] Because the D.C. Circuit reviews so many APA cases, and because it has not yet passed on this discovery issue, it would be advisable to allow that court to consider this issue as well as the de facto membership issue.

[14] *United States v. Armstrong*, 517 U.S. 456 (1996).

[15] *United States Postal Service v. Gregory*, 534 U.S. 1 (2001).

[16] *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir.), *cert. denied sur nom Nixon v. Dellums*, 434 U.S. 880 (1977).

[17] *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985).

[18] The agency defendants produced some 36,000 pages of supposedly "related" records (Br. 6), many of which were heavily redacted, and all of which had been previously released pursuant to an FOIA request by other persons. Contrary to the inferences raised by petitioners' brief (Br. 23, n.2),

(continued...)

Although this case involves a presidential advisory committee, the no-discovery rule that petitioners espouse would be equally applicable to actions involving advisory committees established by agencies. If the APA is the only basis for court review of FACA claims, and since FACA does not distinguish in any way material to this issue between agency and presidential committees, the "administrative record" would be the sole basis for judicial review in any FACA case, not just those where the President established the committee. Moreover, the logic of petitioners' no-discovery argument would extend beyond the issue of whether the committee was subject to the Act, and would apply to any other claims of non-compliance for which discovery is needed to prove the plaintiff's case. And since most advisory committees operate with a premium on secrecy, unless compelled to do otherwise, the no-discovery rule will spell the death knell on FACA compliance through private actions. Surely, the Congress that wrote FACA to control federal advisory committees cannot have meant to shackle the enforcement of FACA by making it impossible to take the discovery needed to win a case. While the extent of permissible discovery under FACA, especially with presidential committees, is surely an issue on which reasonable people can differ, the right to take at least some minimal discovery of the kind contemplated here should not be debatable.

As an alternative, petitioners urge that at least the Vice President should be dismissed because a mandamus claim involving FACA does not lie against the Vice President (Br. 28). *But see Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996)

---

[18](...continued)
none of those records describes anything material about the operation of the Task Force or its sub-groups. Although the non-agency defendants may have some documents not in the possession of agency personnel, respondents intend, on remand, to seek to compel the agency defendants to comply fully with the existing requests to them. If, as petitioners allege, the 36,000 pages did relate to the Task Force or its sub-groups, the claim that no discovery can be permitted even from the agency defendants, who are among the petitioners in this Court, would be inconsistent with their having produced those documents.

(action directly against President); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1325-1332 (D.C. Cir. 1996) (Presidential Executive Order challengeable in non-APA case brought against Secretary who enforces the Order). It is difficult to understand what jurisdictional basis there could be to obtain interlocutory review on that issue, but it is even more difficult to understand why petitioners care so deeply about his dismissal. As we have shown above, there is no imminent likelihood that he will have to respond to any discovery personally, and the district court has been clear that it will closely monitor all discovery. The current discovery can almost certainly be answered by staff and/or agency personnel, and while there may come a time when certain key information is known only to the Vice President, he could not be deposed, either as a party or as a third party witness, unless respondents made a substantial showing of need to the district court. Respondent Sierra Club named the Vice President because he is the person responsible for the operation of the Task Force, and so was a logical defendant, to the point where it would have been odd if he had *not* been named. The principal reason why he should be retained as a party (aside from the fact that he is doing his best to be dismissed for reasons that do not comport with the likely course of discovery) is that he may be needed to assure that complete relief can be obtained, as the district court recognized. Pet. App. 96a-97a. Practicalities aside, the Vice President has shown no more reason why this Court should order his dismissal than have any of the other petitioners, and so the case should go forward against him as well.

C. Applying FACA to a Presidential Committee to Which Private Persons Are Invited to Participate Does Not Violate Principles of Separation of Powers.

The district court was correct in declining to decide the constitutional issue at this stage of proceedings, and this Court should do the same. As the district court properly recognized, this case may be resolved on purely factual grounds –

respondents may not be able to prove that private persons were de facto members of the Task Force or its sub-groups --- or on legal grounds – some participation may be shown, but it may not rise to the level of de facto membership – or, although the district court did not specify this ground, settlement is always a possibility. This Court has long held that constitutional issues should be decided only as a last resort, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, concurring); petitioners ask this Court to decide them as a first resort.[19]

One possible basis for deciding the constitutional issue now would be if the very discovery process that might produce a decision on non-constitutional grounds was itself fraught with constitutional infirmities that would simply trade one constitutional issue for another. In this case, petitioners claim that the discovery that is being sought by respondents at this stage is "at least as intrusive as the disclosure obligations imposed by FACA itself" (Br. 20-21). But as respondent has demonstrated above, that assertion seriously mischaracterizes the discovery request currently authorized and the assurances given by the district judge that respondents will be kept under a very tight rein during discovery. Of course, it is possible that specific discovery may raise separation of powers or Executive privilege issues, but if that should occur, petitioners can move the district court for appropriate relief, and, if that avenue is exhausted, seek a writ of mandamus. But, as of this time, there is nothing but speculation that discovery will inevitably lead to further constitutional confrontations, and there is surely nothing to support petitioners' claims about the extent of the discovery sought by respondents or allowed by the trial court.

Petitioners argue that it would be a violation of separation of powers for FACA to create a situation in which

[19] Paradoxically, petitioners insist that discovery "would in this case" confirm that there were no private members (Br. 21), while also insisting that this Court decide a major constitutional question before discovery is begun.

the President is unable to determine whether a committee that he wished to create would be exempt from FACA. The Court need not pass on such a hypothetical because the line drawn in section 3(2) is crystal clear, or at least it will be once the de facto member doctrine is settled: if the President wishes to have a committee that provides him advice without having to comply with FACA, he must include only federal officials on the committee (and any sub-groups that it sets up), and he must instruct his subordinates that no private persons may be invited to participate in roles functionally indistinguishable from those undertaken by federal officials.

There are decided benefits from having an exempt committee, but there are drawbacks as well. If a President wants to obtain "independent" advice to support his program – as President Bush attempted to do with his Social Security commission or the recently-formed commission on intelligence breakdowns (*see* NRDC Brief at 7) -- he cannot obtain that detachment in-house. Similarly, a President may have to go outside the Government when there is a need for particular expertise or points of view on an advisory committee, or when the work will consume a substantial amount of time that most high level federal officials cannot spare. But under FACA, that choice is his, so long as he abides by the clear line that in-house committees must be "wholly" in-house, and that a single private member causes the exemption to be lost.

Petitioners also appear to argue that it would violate separation of powers to apply FACA to a committee composed of some federal officials and some private parties. It is unclear whether that argument depends on the private members having their status as a result of the de facto member doctrine, or whether it would apply even if the President named them to the committee. It is also unclear whether the number of private members is of any significance, or whether the ratio of public to private members matters. In our view those, and perhaps other, distinctions may well matter in making the proper separation of powers balancing analysis, using the "more pragmatic, flexible approach" required by *Nixon v. General*

Services Admin., 433 U.S. 425, 442-443 (1977), a case heavily relied on by the district court (Pet. App. 100a), but cited by petitioners only on page 34, and then only because it was quoted in *Morrison v. Olson*, 487 U.S. 654, 695 (1988).[20]

There are also strong interests of Congress that must be considered in such a separation of powers analysis. These include assuring that taxpayer funds are wisely spent. Whether private parties are paid o receive reimbursement for expenses (a common feature of advisory committees), their presence is never cost-free, either because of additional out-of-pocket expenses that must be incurred, or simply because agency officials will have to devote additional time to providing them with materials and information so that they can perform their advisory duties properly. In addition, Congress has a recognized interest in seeing that taxpayer-funded and/or government sponsored advisory committees provide unbiased advice, so that Congress and the public can consider their recommendations with reasonable certainty that they are not simply the views of one side in a debate. Of course, if the President does not want to receive balanced advice, he can limit the members of a committee to federal officials, or rely on private advice outside the committee structure, with all of the downsides those alternatives bring. Thus, FACA was not passed to burden the President in his efforts to gather advice, but to lay down some quite modest rules if the President chooses to obtain collective advice from persons outside the government. *See* NRDC Brief at 5-6.[21]

---

[20] The cases cited by petitioners on page 32 of their brief all involve actions by Congress that directly interfered with the operation of another branch. Because this case involves at most indirect interference with the powers of the President, the fact-dependent balancing test applied in *Nixon v. GSA*, *supra*, is the appropriate one to use, and it is dependent on the facts, which have yet to be established.

[21] Petitioners do not take a clear position on whether it would be unconstitutional if FACA were applied to a committee appointed by the President entirely of private individuals. In light of these congressional purposes, that argument would be very difficult to sustain, and yet, unless

(continued...)

But before that balancing could be done, it would also be necessary to identify the portion of FACA that was alleged to burden the President's power to gather advice from others. Surely, it cannot be the requirement of a charter because the President's memorandum establishing the Task Force comes close to satisfying that mandate. It is also difficult to see how making public a list of a committee's members would inevitably and substantially interfere with the President's role as chief executive, or how a requirement that there be a public announcement of all meetings, whether open or closed, would be an impediment to the functioning of his office. In addition, many committee documents may also be in the possession of agency officials, and hence be subject to FOIA that way. Thus, although some documents from some committees might be properly withheld, there is no reason to think that every document held by every presidential advisory committee would raise issues of Executive privilege or be otherwise properly kept secret. And even the open meeting rule, with its generous exceptions, would not cause serious separation of powers concerns in most cases, as indeed many presidential advisory committees have had their meetings open to the public since FACA was passed with no obvious problems.[22]

---

[21](...continued)
petitioners are prepared to take that position, it is almost impossible to know where they would draw the line between valid and invalid presidential committees.

[22] Respondent recognizes that the three-Justice concurring opinion in *Public Citizen v. Department of Justice*, *supra*, did not examine the elements of FACA separately before reaching its conclusion that it was unconstitutional as applied to the ABA Committee before it. Respondent believes that an all-or-nothing approach is in error because it is inconsistent with the way that this Court normally reviews the constitutionality of statutes. *Watson v. Buck*, 313 U.S. 387, 402 (1941). That approach may have been justified in *Public Citizen* where the power at issue – to nominate federal judges – was exclusively that of the President (*see* 491 U.S. at 482-488), the plaintiffs invoked FACA because the President had "utilized" but not "established" the ABA Committee, and there was a final judgment with all of the relevant facts established. By contrast, here, there has been no discovery, and the

(continued...)

The bottom line is that whatever constitutional problems there may be for some aspects of FACA as applied in some situations to some presidential advisory committees, there is no basis for this Court to rule on the truly sweeping claims of unconstitutionality raised by petitioners. That is particularly true with respect to sub-groups since, as the D.C. Circuit noted in *AAPS*, 997 F.2d at 913, if the main committee is exempt, there is even more reason to be concerned about sub-groups, and, we submit, even less of a reason to think that applying FACA to such sub-groups will interfere in any way with the President's powers. Indeed, there are insufficient grounds to call into question the constitutionality of FACA -- as applied to presidential advisory committees and their sub-groups with a mix of public and private members – to construe FACA as petitioners urge in order to avoid constitutional problems.

* * *

We conclude with the same point we made to begin each of the arguments in Point II: the record is undeveloped, the lower courts have not had an opportunity to consider the merits, and petitioners' legal arguments are very broad and may never have to be decided at all, let alone in this case. Accordingly, even if this Court has jurisdiction to decide any of petitioners' claims on the merits -- and it does not -- it should decline to do so, and at most direct the court of appeals to consider the statutory arguments, leaving the constitutional claims for another day, and perhaps another case.

---

[22](...continued)
subject of the Task Force's deliberations -- proposals for energy policies -- could emanate not only from the President, but from Congress, from a state, from an energy company, or from the Sierra Club, and in each case the consequences would be the same: nothing would happen unless Congress enacted the recommendations into law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

David Bookbinder
Sierra Club Environmental
Law Program
408 C Street, NE
Washington D.C. 20002
(202) 548-4598

Alan B. Morrison
(Counsel of Record)
Scott Nelson
Public Citizen Litigation
Group
1600 20th Street, NW
Washington D.C. 20009
(202) 588-7720

Patrick Gallagher
Alex Levinson
Sanjay Narayan
Sierra Club Environmental
Law Program
85 Second Street
San Francisco CA 94104
(415) 977-5769

Attorneys for Respondent Sierra Club

March 11, 2004

Supreme Court, U.S.
FILED
APR 15 2004
OFFICE OF THE CLERK

No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

		Page
I.	The decisions below improperly expand the scope of FACA, conflict with this Court's separation-of-powers decisions, and would render FACA unconstitutional	1
	A. The construction of FACA adopted below is inconsistent with the text, history, and purposes of the statute	2
	B. The decisions below violate the presumption of regularity and other settled principles governing judicial review of Executive Branch actions	8
	C. The decisions below violate the separation of powers guaranteed by the Constitution	11
II.	Petitioners' objections are neither premature nor stale, and respondents' jurisdictional arguments, like the decisions below, are mistaken	15

TABLE OF AUTHORITIES

Cases:

Barenblatt v. *United States*, 360 U.S. 109 (1959)	13, 14
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	10
Clinton v. *Jones*, 520 U.S. 681 (1997)	19, 20
Ferri v. *Ackerman*, 444 U.S. 193 (1979)	20
Franklin v. *Massachusetts*, 505 U.S. 788 (1992)	7, 10
INS v. *Chadha*, 462 U.S. 919 (1983)	13
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)	7
Morrison v. *Olson*, 487 U.S. 654 (1988)	14
National Archives & Records Admin. v. *Favish*, 124 S. Ct. 1570 (2004)	9, 14
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977)	14
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982)	20
Papandreous, In re, 139 F.3d 247 (D.C. Cir. 1998)	19

Cases—Continued: Page

Public Citizen v. *United States*, 491 U.S. 440 (1989) 1, 4, 5, 7, 13, 15
United States v. *Armstrong*, 517 U.S. 456 (1996) 8, 9
United States v. *Chemical Found., Inc.*, 272 U.S. 1 (1926) 8, 9
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 13
United States v. *Nixon*, 418 U.S. 683 (1974) 14, 16, 17
United States Postal Serv. v. *Gregory*, 534 U.S. 1 (2001) 8
Webster v. *Doe*, 486 U.S. 596 (1988) 12
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 13

Constitution, statutes and regulations:

U.S. Const.:
Art. I 14
Art. II 7, 12, 14, 19
§ 2, Cl. 1 (Opinion Clause) 12
§ 3 (Recommendations Clause) 12, 13
3 U.S.C. 106 20
5 U.S.C. App. 3(2) 2, 3
5 U.S.C. App. 9(a)(1) 2, 3
41 C.F.R. 101-6.1003 (2000) 3
Exec. Order No. 11,007, 3 C.F.R. 182 (1962) 4

Miscellaneous:

H.R. Rep. No. 1731, 91st Cong., 2d Sess. (1970) 5
S. Rep. No. 1098, 92d Cong., 2d Sess. (1972) 5, 6
John Story, *Commentaries on the Constitution of the United States* (Ronald D. Rotunda & John E. Nowark eds., Carolina Acad. Press 1987) (1883) 12

REPLY BRIEF FOR THE PETITIONERS

The construction of the Federal Advisory Committee Act (FACA) urged by respondents, and adopted by the courts below, would transform a statute designed to regulate the establishment of advisory committees of *non-government* experts into a general warrant to search Executive Branch advisory groups for contacts with outsiders who some might deem to be de facto "members." It would convert FACA—which expressly exempts advisory groups made up exclusively of government employees—into a mechanism for intrusive and unconstitutional interference with core Executive Branch functions. Such a construction of FACA should be rejected because it fundamentally misunderstands the statute and would violate the presumption of regularity and other principles of judicial review of Executive actions. Moreover, if any doubt existed on this score, it should be resolved, as in *Public Citizen* v. *United States*, 491 U.S. 440, 455-465 (1989), to avoid serious constitutional difficulties. Otherwise, application of FACA to the National Energy Policy Development Group (NEPDG), including the district court's discovery orders, is unconstitutional. See Pet. Br. 28-38.

The court of appeals had both mandamus and appellate jurisdiction. The important separation-of-powers questions raised in this case are neither premature nor stale. And the discovery ordered below was not some preliminary step on the way to a possible separation-of-powers violation, but a significant violation in itself.

I. THE DECISIONS BELOW IMPROPERLY EXPAND THE SCOPE OF FACA, CONFLICT WITH THIS COURT'S SEPARATION-OF-POWERS DECISIONS, AND WOULD RENDER FACA UNCONSTITUTIONAL

As petitioners have demonstrated (Pet. Br. 12-20), the court of appeals' so-called "de facto membership" doctrine, particularly as applied in this case to authorize broad discovery triggered by the mere allegation of participation by unauthorized members, effectively eliminates FACA's

express (and constitutionally necessary) exception for advisory groups comprised solely of government officials or employees. See 5 U.S.C. App. 3(2), at 2. It also undermines both FACA's requirement that the President (or an agency) "establish[] or utilize[]" an advisory committee, 5 U.S.C. App. 3(2), at 2, and its prohibition of any such committee not "specifically authorized by statute or by the President," 5 U.S.C. App. 9(a)(1), at 5. As a result, the decisions below conflict with FACA's text and this Court's cases governing the separation of powers and judicial review of Executive actions.

A. The Construction Of FACA Adopted Below Is Inconsistent With The Text, History, and Purposes Of The Statute

1. Respondents acknowledge (SC Br. 40-43; JW Br. 30, 45-46) that Congress created an exception from FACA's disclosure and other requirements for advisory groups composed entirely of government officials or employees precisely to avoid the separation-of-powers concerns raised by this case. For example, respondent Judicial Watch concedes that Congress adopted this exception to avoid "important constitutional concerns," JW Br. 30, and in particular to "respect[] the Opinion Clause" of the Constitution, *id.* at 46.

Nevertheless, under respondents' approach, no matter how clearly the President established or utilized an advisory group consisting *solely* of government officers, anytime a plaintiff makes an unsupported allegation of unauthorized, de facto members, "[the] plaintiff [would be] entitled to discovery to determine whether, as a factual matter, non-federal officials regularly participated in the work of an advisory committee * * * in such a manner as to become de facto members of the committee." SC Br. 2. Congress's constitutionally necessary exception for government-member groups would have little practical value if a mere allegation of an unofficial member could subject any such group—from the Cabinet on down—to intrusive discovery that raises the same or greater constitutional concerns as would a final

judicial determination that FACA applied. Congress plainly did not include the exception for all-government groups just to have it rendered nugatory by creative pleading and liberal discovery orders that disregard the presumption of regularity afforded Executive Branch actions.

2. Respondents' approach also disregards the provisions of FACA that ensure that the President (or an agency) has control over the manner in which an advisory group is established and utilized. FACA expressly forbids the creation of unauthorized, de facto advisory committees, 5 U.S.C. App. 9(a)(1), at 5, and recognizes that the President, by the manner in which he establishes the group and defines its membership, determines whether FACA applies, 5 U.S.C. App. 3(2), at 2. See 41 C.F.R. 101-6.1003 (2000).

Respondents concede (SC Br. 2; JW Br. 30-34), as they must, that the President established the NEPDG to consist entirely of government officers, and that the NEPDG in its report formally identified its members as only those government officers identified by the President. Respondent Judicial Watch, moreover, concedes (JW Br. 30) that one of the ways that Congress tried to "resolve" the "important constitutional concerns" associated with regulating "the process by which the President and other Executive Branch officials obtain information in performing functions assigned to them by the Constitution" was to "leav[e] it to the President or his subordinates to choose whether to establish *or* utilize an advisory committee that includes outside members and, thereby, is subject to FACA's balance and disclosure requirements." But, as with FACA's exception for all-government advisory groups, respondents' approach would render these important limitations largely meaningless by authorizing broad discovery based solely on an unsupported allegation that the group, as "utilized," had unauthorized, de facto members.

Respondent Judicial Watch, for example, argues (JW Br. 31) that petitioners' construction of FACA "ignores FACA's

applicability to advisory committees 'utilized' [as opposed to 'established'] by the President." Both respondents, moreover, argue that focusing on the formal membership of the advisory group as established by the President "is an open invitation to massive evasion of FACA" (SC Br. 10) and would "render violations of" FACA "effectively unreviewable" (JW Br. 35). Respondents are not only mistaken, but their arguments demonstrate a fundamental misunderstanding of FACA's text and purposes.

First, as this Court held in *Public Citizen*, Congress's inclusion of the term "utilized" in addition to "established" was only intended to broaden slightly the disclosure and balance requirements previously imposed by Executive Order No. 11,007, so as to include "advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves." 491 U.S. at 462. Section 2(a) of Executive Order No. 11,007 defined the term "advisory committee" to mean any advisory group "that is *formed* by a department or agency of the Government * * * and that is not composed wholly of officers or employees of the Government," as well as any such group "that is *not formed* by a department or agency, but only during any period when it is being *utilized* by a department or agency in the same manner as a Government-formed" group. 3 C.F.R. 182 (1962) (emphasis added). It is precisely this meaning of "*utilized*" that this Court in *Public Citizen* said Congress was intending to include in FACA. See 491 U.S. at 458-465. Here, it is undisputed that the President "established" the NEPDG to consist solely of government officers. Respondents' attempt to avoid the natural consequence of that concession by emphasizing the term "utilized" is entirely misplaced, since as Executive Order No. 11,007 makes clear, that term refers only to groups "not formed" or established by the President or an agency.

Second, contrary to respondents' suggestions (SC Br. 1-2, 29; JW Br. 48), Congress manifestly did not enact FACA to regulate all aspects of the process by which the President seeks advice to formulate policies or legislative proposals, nor was FACA intended to remove the influence of all outside interests from Executive Branch decisionmaking. Congress did not enact FACA to police or prohibit "ex parte contacts" with Executive Branch Officials, which are, outside of the narrow contexts like Executive Branch adjudications, a sign of a functioning representative democracy. Rather, as this Court indicated in *Public Citizen*, Congress enacted FACA to address "specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." 491 U.S. at 453. That is why Congress required the President or an agency to establish an advisory committee and prohibited the creation of unauthorized, de facto FACA committees. See S. Rep. No. 1098, 92d Cong., 2d Sess. 1 (1972) (purpose of legislation to "strengthen the authority of Congress and the executive branch to limit the use of Federal advisory committees to those that are necessary and serve an essential purpose" and to "provide uniform standards for the creation, operation, and management of such committees"). Yet, under respondents' view, FACA committees can routinely spring to life by virtue of a post-hoc judicial determination that unauthorized members participated in the group's deliberations, regardless of the formal procedures used to establish the group.

Moreover, the examples of advisory groups identified in the legislative history of FACA, and discussed by this Court in *Public Citizen*, involved the *acknowledged* participation of non-government members. See, *e.g.*, S. Rep. No. 1098, *supra*, at 8; 491 U.S. at 460-461. As those examples demonstrate, Congress was concerned about waste and manipulation by government or private interests of advisory groups of *non-government* experts. See See H.R. Rep. No. 1731, 91st Cong., 2d Sess. 4 (1970). Those concerns have no application where, as here, the group is formally established to

consist solely of *government* officers and there is only an allegation of secret, de facto members. That, in fact, is the inverse of the problem identified by Congress, and there is no reason to believe FACA was intended to address that situation.

To the contrary, the Senate Report specifically noted that prior versions of the bill would have imposed disclosure and balance requirements on advisory groups consisting entirely of government officers or employees, and that those proposals were rejected because Congress determined that (1) "the main problems of proliferation, confusion and operational abuse lay with those advisory committees whose membership in whole or in part comes from the public [*i.e.*, non-government] sector," S. Rep. No. 1098, *supra*, at 8, and (2) "the matter of controlling the number *and activities of inside-government committees* was better left to the President, the OMB and the agencies, which had sufficient legislative and administrative authority to deal with the problem," *ibid.* (emphasis added).

Accordingly, respondent Sierra Club misses the point of FACA entirely when it complains (SC Br. 30) that "if agencies know that no court can go behind the formal designation of a committee's membership to determine even whether FACA applies, that will provide a huge opportunity to render FACA almost meaningless." FACA, as its name suggests, regulates advisory committees *as established by the President or agency*, not all interactions between private citizens and the Executive Branch. Where, as here, the President formally designates an advisory group as consisting solely of government officers, any concern about "the * * * activities of [that] inside-government committee[]"—including the amount and nature of its contacts with private interests—"[is] better left to the President," who "ha[s] sufficient * * * authority to deal with the problem." S. Rep. No. 1098, *supra*, at 8.

3. Respondents do not deny that their construction of FACA, together with their disregard for the presumption of regularity afforded Executive actions, would have the effect

of eliminating most, if not all, of the protections afforded by FACA's provisions excluding all-government advisory groups and limiting FACA committees to those formally designated by the President or his subordinates. Indeed, respondents wholeheartedly embrace the notion that a court must disregard the Executive's own description of its advisory group and permit discovery to determine whether the number, frequency, or nature of contacts between the official government members of the group and private persons are sufficient for the judiciary to deem those private persons de facto members. Such a formless, post-hoc judicial inquiry would be required, moreover, in every case in which the plaintiff makes an unsupported allegation of de facto membership. Even if the discovery—which, as this case demonstrates, would often be broader than the disclosure requirements imposed by FACA itself—confirms the Executive's account of the committee he created (as it would here), the intrusion on the Executive Branch would be complete. Accordingly, under respondents' view, and that adopted by the courts below, constitutionally problematic discovery will be necessary in virtually every FACA case.

Such an approach stands in stark contrast to this Court's decision in *Public Citizen*, where the Court went to great lengths to impose limits on FACA to avoid unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. See 491 U.S. at 466-467; see also *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992), and *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). This case involves the same statute and raises the same separation-of-powers concerns involved in *Public Citizen*, and it does so in a context in which the interference with the Executive's functions is far more direct and the construction of the statute that avoids those difficulties is far more obvious. See Pet. Br. 20-22, 35-38. Accordingly, the Court should reject the de facto member doctrine to avoid a construction of FACA that would, at a minimum, raise serious constitutional concerns.

B. The Decisions Below Violate The Presumption Of Regularity And Other Settled Principles Governing Judicial Review Of Executive Branch Actions

1. The courts below could have avoided the separation-of-powers concerns inherent in the district court's discovery orders by properly applying longstanding principles of judicial review of Executive actions. See Pet. Br. 22-28. Most notably, the courts below should have adhered to the rule that, "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996) (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). The lower courts' complete disregard for the presumption of regularity, standing alone, provides a sufficient basis for reversal in this case.

Respondents' attempts to distinguish this Court's presumption of regularity cases are unavailing—and inconsistent. The Sierra Club provides no argument at all for why the presumption should not apply here, and instead merely asserts (SC Br. 37) that none of the Court's cases applying the presumption has "arise[n] in contexts remotely similar to this case." While it is true that none of those cases involved application of FACA, the Sierra Club's own description underscores the broad range of cases and contexts in which this Court has consistently adhered to the presumption. See *id.* at 3. The diversity of those cases, moreover, rebuts Judicial Watch's mistaken characterization (JW Br. 27) of the presumption as being solely "a principle of APA law" that does not apply in other areas, such as mandamus actions.

In fact, the presumption of regularity is fully applicable here. As this Court explained in *Armstrong*, the presumption "rests in part on an assessment of the relative competence" of Executive Branch officials and courts, as well as on "a concern not to unnecessarily impair the performance of a core executive constitutional function." 517 U.S. at 465. Those concerns warrant strict adherence to the presumption

of regularity in this case, and that presumption would preclude any discovery based on respondents' unsupported —and, indeed, contradicted—allegations of unauthorized, de facto members. See Pet. Br. 22-23.

This Court's recent decision in *National Archives & Records Administration* v. *Favish*, 124 S. Ct. 1570, 1581-1582 (2004), further confirms that view. There, the Court rejected a view of the Freedom of Information Act that would transform a statutory exception "into nothing more than a rule of pleading," and held that "where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to gain disclosure." *Id.* at 1581. Analogizing to the presumption of regularity identified in *Armstrong* and other cases, the Court observed that a "presumption of legitimacy" would apply to the government's actions, thereby requiring the requestor to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Ibid.* The Court observed that "[t]he presumption perhaps is less a rule of evidence than a general working principle," but reaffirmed that, "[h]owever the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it." *Ibid.* (citing *United States* v. *Armstrong*, *supra*, and *United States* v. *Chemical Found., Inc.*, *supra*). Respondents have provided no reason to conclude that the presumption of regularity should not apply to government actions under FACA.

2. Petitioners showed in their opening brief (at 24-26 & n.3) that the district court's assumption that respondents could proceed against the Vice President on a mandamus claim, see Pet. App. 96a-97a, is plainly mistaken. Respondents have done nothing to rebut that showing, nor have they demonstrated why mandamus should be available against the Vice President here. See SC Br. 38-39; JW Br. 27-28.

Petitioners also demonstrated (Pet. Br. 26-28) that the discovery ordered below would not even be appropriate in an action brought under the APA, which would not apply to the President or the Vice President, in part because of separation-of-powers considerations. See *Franklin*, 505 U.S. at 800-801. Respondent Sierra Club complains (SC Br. 32) that "there is nothing in FACA at all that suggests that it limits the circumstances under which a plaintiff can obtain discovery." That is true, but unilluminating. FACA itself provides no cause of action, much less rights to discovery, and so quite naturally does not impose limits on discovery for a non-existent cause of action. A FACA claim can be enforced, if at all, only under the APA, which generally limits proceedings to an administrative record and does not include a right to discovery.

Respondents assert (SC Br. 34-35; JW Br. 29) that discovery is available consistent with the APA under *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419-420 (1971), because there is a "gap" in the administrative record concerning the membership of the NEPDG. But both the President's memorandum establishing the NEPDG and the NEPDG's report confirm that only federal officials were members of the NEPDG. The only conceivable "gap" to which respondents point stems solely from their unsupported allegation that the President was disobeyed and private individuals were somehow permitted to serve NEPDG members. Such baseless allegations, however, could be made to suggest a "gap" in *any* administrative record and are plainly insufficient under *Overton Park* to require a further explanation by appropriate officials, much less intrusive discovery. See Pet. App. 38a-39a (Randolph, J., dissenting).

Nor is discovery warranted based on the Sierra Club's contention (SC Br. 2-3, 15-16) that there is a gap in the administrative record concerning the membership of NEPDG "subgroups." First, the allegation of unauthorized "subgroups" amounts to nothing more than the unsupported allegations of de facto members. The Sierra Club's complaint identified the so-called "Sub-Groups" as being precisely those "groups of energy industry executives and other non-federal employees" that it alleges were de facto members. J.A. 146.

In any event, respondent is mistaken about the status of the administrative record. The Presidential memorandum establishing the NEPDG authorized the Vice President to establish "subordinate working groups to assist the [NEPDG] in its work," subject to the same requirement that members be "officers of the Federal Government." The Knutson Declaration noted that authorization, but explained that "[t]he Vice President did not establish any such working groups." J.A. 240. The Knutson Declaration further explained that while there was one staff-level support group, it was comprised solely of government officials or employees. J.A. 240-241.

In sum, because neither FACA, nor the APA, nor mandamus, nor any combination thereof entitles respondents to the far-reaching and constitutionally problematic discovery ordered by the courts below, the decisions below should be reversed.

C. The Decisions Below Violate The Separation Of Powers Guaranteed By The Constitution

Respondent Sierra Club makes no meaningful attempt to address the merits of petitioners' separation-of-powers arguments, instead relying on assertions that those constitutional arguments are either premature or stale and that the court of appeals lacked jurisdiction to address them. SC Br. 16-26, 39-44. Although Judicial Watch raises additional objections to petitioners' constitutional arguments (JW Br. 39-49), they are equally unavailing.

1. Both respondents attempt to minimize the core Executive Branch functions implicated in this case by pointing out that groups other than the Executive, including Congress itself, can recommend legislation dealing with energy policy. SC Br. 43-44 n.22; JW Br. 46. While true, that fact is entirely beside the point. It is equally true that Congress and others can "nominate" individuals to certain positions in

government. That, however, does not make the power to nominate federal judges, at issue in *Public Citizen*, any less an exclusively Executive power. Similarly, Congress, through the Senate, has as much a role in confirming the President's nominations as it does in acting on the President's legislative proposals. But Congress still cannot make *presidential* nominations any more than it can propose *presidential* legislative recommendations. Those powers belong exclusively to the President.

The Recommendations Clause, for example, expressly contemplates that the President will, "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. The President's duties to inform Congress and to recommend measures for its consideration presuppose that the President "must possess more extensive sources of information * * * than can belong to [C]ongress," Joseph Story, *Commentaries on the Constitution of the United States* § 807, at 575 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833), and that he must be able to cultivate his sources of information and develop for himself the "measures" that he will recommend. Moreover, the Recommendations Clause expressly vests the exercise of those powers in the President's own discretion. Because the President's duty requires him to recommend only what "*he* shall judge necessary and expedient" (U.S. Const. Art II, § 3 (emphasis added)), the Constitution indicates clearly that this exclusively Executive power must remain free from interference. Cf. *Webster* v. *Doe*, 486 U.S. 596, 600 (1988). While others may be able to recommend legislation to Congress, the measures the President recommends remain *his* recommendations, not the recommendations forced upon him according to some system of congressional or judicial regulation.

Similarly, the President's power under the Opinion Clause is exclusively an Executive function under Article II of the Constitution. Judicial Watch's contention (JW Br. 45) that

Congress's investigative powers somehow render the President's Opinion Clause powers non-exclusive is plainly mistaken. Congress's investigative power is derivative of, and constrained by, its legislative power. As this Court explained in *Barenblatt* v. *United States*, 360 U.S. 109, 111-112 (1959), "[s]ince Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." If Congress cannot "inquire into matters which are within the exclusive province" of the Executive, then, *a fortiori*, it cannot empower the public to force disclosure of such matters. This is true, moreover, without regard to the assertion of a claim of Executive privilege. The Constitution vests no power in Congress to regulate such exclusively Executive functions. See *INS* v. *Chadha*, 462 U.S. 919 (1983); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Public Citizen*, 491 U.S. at 482 (Kennedy, J., concurring).

Judicial Watch's reliance on Justice Jackson's description of the Opinion Clause as "trifling," see JW Br. 45 (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 n.9 (1952) (Jackson, J., concurring), is entirely misplaced. Justice Jackson used that term not to show that the Opinion Clause power was unimportant, but to the contrary, that the power is so central to the functioning of the Executive Branch that its express enumeration in the Constitution was less necessary. 343 U.S. at 641 n.9.

Respondents spend most of their discussion of the constitutional issues arguing for application of the balancing approach to separation of powers issues that this Court has generally applied to Congress's attempts to regulate matters not exclusively delegated to the Executive by the Constitution. See SC Br. 39-44; JW Br. 40-49. For the reasons set forth above and in petitioners' opening brief (at 28-38), petitioners submit that the Constitution, by its textual resting of the Executive Power in the President and by the Opinion and Recommendations Clauses, has already struck any balance that there is to be struck here—the Constitution

preserves the zone of autonomy for the President in obtaining advice he seeks to perform his duties.

Even if, however, this Court were to apply a balancing approach, it is clear that any such balance would weigh heavily against allowing the discovery at issue here. Cf. *Morrison* v. *Olson*, 487 U.S. 654, 695 (1988); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Congress's legitimate interests are non-existent when it comes to investigating the discharge of functions within the exclusive province of another Branch—such as the process by which the President gathers advice and information to formulate *his* policies and recommendations. See *Barenblatt*, 360 U.S. at 111-112. This is especially true in the context of the President's *legislative* recommendations, the destiny of which is controlled by Congress. While Congress will have the opportunity to judge the merits of the President's legislative proposals as part of its discharge of its Article I authority, it has no legitimate role in interfering with the President's determination of how to formulate those proposals.

Similarly, respondents have no meaningful need for the information that they seek. As the record amply shows, any further discovery would only confirm that the NEPDG was organized as the President directed and the group itself reported, that FACA does not apply, and that respondents, therefore, are not entitled to any of the information that they seek. In any event, a mere interest in disclosure for its own sake could not remotely counterbalance the extreme interference with core Article II responsibilities authorized by the decisions below, see *Favish*, 124 S. Ct. at 1581-1582, any more than a mere interest in disclosure for its own sake would justify a law that required the deliberations of this Court to be open to public scrutiny. This is not remotely a case, for example, like *United States* v. *Nixon*, 418 U.S. 683 (1974), in which a carefully circumscribed intrusion into the Executive's sphere of confidentiality was permitted only because of countervailing interests of *constitutional* dimension in the context of criminal wrongdoing. Accordingly, as explained in petitioners' opening brief (at 35-38), the decisions below are fundamentally inconsistent with both the majority and concurring opinions in *Public Citizen*. See 491 U.S. at 452-467; *id.* at 481-489 (Kennedy, J., concurring).

II. PETITIONERS' OBJECTIONS ARE NEITHER PREMATURE NOR STALE, AND RESPONDENTS' JURISDICTIONAL ARGUMENTS, LIKE THE DECISIONS BELOW, ARE MISTAKEN

1. As petitioners have explained (Pet. Br. 38-47), the court of appeals also erred in holding that it lacked mandamus or appellate jurisdiction because the separation-of-powers dispute here was akin to an ordinary discovery dispute and just as premature. Respondents devote most of their briefs to defending that mistaken notion.

Both respondents and the court of appeals, however, ignore the reality that there is no meaningful difference —either in real-world effects or in the separation-of-powers concerns raised—between the sweeping discovery ordered in this case and the disclosure obligations imposed by FACA if it were ultimately held to apply. Indeed, far from rendering separation-of-powers problems premature, the imposition of such problematic disclosure obligations based on mere allegations only exacerbates them. It is that immediate separation-of-powers violation—not potential violations that might occur in the event of a mistaken final judgment—that petitioners seek to remedy.

Respondents quibble with petitioners' characterization of the scope of the district court's discovery orders. According to respondents, the district court approved only "very tightly-reigned" discovery directed "[i]n the main" at gathering information on the threshold issue of the extent to which private parties participated in the work of the NEPDG. SC Br. 4, 7 (citation omitted); see *id.* at 11-14; JW Br. 12-21. In reality, the discovery ordered by the district court was both sweeping and unprecedented. It would have provided respondents with greater information about the process by which the President obtained information and advice from the Vice President and other senior presidential advisors

than respondents would have been entitled to receive if they had proven a violation of FACA—all purportedly to determine whether the statute even applied in the first instance. Indeed, even the court of appeals below indicated that the district court's discovery orders went far beyond the information respondents would receive if they prevailed on the merits of their FACA claim. See Pet. App. 16a-19a.

But even as narrowed by the court of appeals to the information that respondents "need to prove their case" (Pet. App. 18a), the discovery authorized below would violate core principles of the separation of powers. The process of reviewing the communications of the NEPDG and its official members to determine whether the communications to others were sufficient to qualify someone else as a de facto member (i.e., the process envisioned by respondents as necessary to "prove their case") necessarily exceeds the disclosure contemplated by FACA and its open-meeting requirements for committees that include non-government members.

Moreover, as respondent Sierra Club acknowledges (SC Br. 12), petitioners' separation-of-powers objections are not based solely on the expansive scope of the discovery below. To the contrary, the decisions below violate established principles designed to minimize friction between the branches by disregarding the presumption of regularity and ordering discovery in this sensitive area based solely on an unsupported allegation in a complaint that the Vice President and other government officials disregarded the President's directive in permitting unauthorized, de facto members to participate in the workings of the NEPDG. See Pet. Br. 28-38.

2. Respondents also argue (SC Br. 16, 18-22; JW Br. 25-26) that the court of appeals lacked jurisdiction under *United States* v. *Nixon*, *supra*, because contempt was not necessarily imminent and the district court may have imposed sanctions short of contempt if the Vice President had disobeyed its discovery orders. The rationale in *Nixon*, however, did not turn on the certainty of contempt if the President had refused to comply with the order, but rather on the recognition that, unless the Court allowed an appeal, inviting

a contempt sanction would be the only certain way for the President to obtain review. That reasoning is equally applicable here, as is the Court's determination that it would be "inappropriate" and "unseemly" "[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling," and doing so "would present an unnecessary occasion for constitutional confrontation between two branches of the Government." 418 U.S. at 691-692. Absent immediate appellate review under either mandamus or an appeal under *Nixon*, the only way that the Vice President could obtain review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery, suffer the indignity of a court-imposed sanction, and then either appeal the sanction or, if the initial sanction were deemed unappealable, invite a more serious (and therefore more "inappropriate" and "unseemly" under *Nixon*) and appealable sanction. Requiring such a procedure is plainly inconsistent with *Nixon*.

3. Paradoxically, the Sierra Club renews (and expands) its argument, raised for the first time in its brief in opposition to certiorari, that petitioners' separation-of-powers objections are not only premature, but stale, and should have been raised in an appeal of the district court order denying petitioners' motion to dismiss. The Sierra Club goes so far as to argue (SC Br. 23-24) that petitioners' separation-of-powers arguments should be barred by the equitable doctrine of laches.

As petitioners' explained in their opening brief (at 44-47), the Sierra Club's staleness argument is meritless and only serves to demonstrate the folly of respondents' prematurity arguments. The fact that petitioners argued in their motion to dismiss that application of FACA's disclosure requirements would violate fundamental separation-of-powers principles does not preclude them from arguing—either in the district court or in the court of appeals on mandamus or appellate review—that the district court's discovery orders and disregard of the presumption of regularity also violate

the separation of powers. Even after denying the motion to dismiss, the district court could have minimized or avoided separation-of-powers concerns by properly applying the presumption of regularity and other established principles of judicial review of Executive action. Its discovery orders issued in disregard of those principles created distinct, more serious, and more immediate separation-of-powers problems, and gave rise to the need for immediate mandamus and appellate review—regardless of whether it should have granted the motion to dismiss.

The Sierra Club's staleness argument, moreover, makes clear that petitioners' separation-of-powers arguments are broader than claims of privilege to individual documents, and instead are more in the nature of a claim of immunity from discovery, at least where the plaintiff fails to overcome the well-established presumption of regularity afforded to Executive Branch actions. See, *e.g.*, SC Br. 23 (noting that petitioners "did not seek mandamus on the ground that the lower court ordered them to provide specific information that is subject to Executive privilege or otherwise exempt from discovery," but "[r]ather, they sought a much 'broader and antecedent' form of discovery immunity") (citation omitted).

In this case, federal agencies have produced tens of thousands of pages of materials and provided detailed interrogatory answers in response to respondents' discovery requests. Respondent Sierra Club complains (SC Br. 37-38 n.18) that "none of those records describes anything material about the operation of the Task Force or its sub-groups." But the fact that the wealth of documentation provided no material support for respondents' unsupported—and contradicted—allegation of unauthorized, de facto members only underscores the inappropriateness of allowing further discovery in derogation of the presumption of regularity.

Noting the many materials the government provided respondents about the nature and composition of the NEPDG, petitioners have resisted discovery against the Vice President and the President's immediate subordinates into the

President's exercise of powers committed exclusively to the President by Article II of the Constitution, including the Opinion and Recommendations Clauses. Because the very essence of petitioners' separation-of-powers objections is that *any* discovery against the Vice President and immediate assistants to the President—let alone discovery tantamount to relief for a proven FACA violation—in the context of the record in this case would violate the separation of powers, it makes no sense to require assertions of privilege over individual documents before allowing mandamus and appellate jurisdiction. Cf. *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough.").

4. Lastly, respondents argue that appellate or mandamus jurisdiction in this case would somehow be inconsistent with this Court's holding in *Clinton* v. *Jones*, 520 U.S. 681 (1997), that the President has no immunity from civil litigation stemming from actions or events that occurred before the President began his term in office. SC Br. 14, 16; JW Br. 19-20. But *Jones* makes clear that its holding is limited to suits based on the President's *unofficial* conduct. Indeed, it reaffirms this Court's numerous decisions holding that Executive Branch officials are immune to lawsuits for money damages based on their *official* conduct, precisely because such suits threaten to interfere with vital Executive Branch functions. See 520 U.S. at 692-694 (discussing cases); cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982); *id.* at 763 (Burger, C.J., concurring). Moreover, because *Jones* involved a claim of temporary immunity from suit, the opinion does not discuss, or undermine, the ample authorities limiting unnecessary discovery of high-ranking government officials in the absence of immunity. See Pet. 18-19 & n.4 (discussing such cases).

Of particular relevance to this case, the Court explained that official immunity exists for Executive Branch officials in

part because "[t]he conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy." *Jones*, 520 U.S. at 693 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)). No statute makes that difference more apparent than FACA, which provides every individual with a right to disclosure and a potential lawsuit. In contrast, the Court observed, "because the President has contact with far fewer people in his private life than in his official capacity, the class of potential plaintiffs is considerably smaller and the risk of litigation less intense." *Jones*, 520 U.S. at 702 n.36. Here, the Vice President's functions related to the NEPDG were Executive functions, which as Congress has recognized, the President may ask the Vice President to perform. See 3 U.S.C. 106.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2004

(8)

Supreme Court, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

No. 03-475

IN THE

Supreme Court of the United States

October Term, 2003

RICHARD B. CHENEY, VICE-PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS SIERRA CLUB AND JUDICIAL WATCH, INC.

DAVID OVERLOCK STEWART
Counsel of Record
THOMAS M. SUSMAN
THOMAS W. BEIMERS
ROPES & GRAY LLP
One Metro Center
700-12th Street N.W.
Suite 900
Washington, D.C. 20005
(202) 508-4600

MARCH 11, 2004

(Names of Amici and additional Amici Counsel listed on inside cover)

BEST AVAILABLE COPY

Names of Amici and Additional Amici Counsel

American Association of Law Libraries

American Library Association
Miriam M. Nisbet
Legislative Counsel
1301 Pennsylvania Avenue N.W. - #403
Washington D.C. 20004-1701

Association of Research Libraries

The Center for American Progress
Mark David Agrast
Senior Vice President for Domestic Policy
805 Fifteenth Street N.W.
Suite 400
Washington D.C. 20005

Common Cause

National Security Archive
Meredith Fuchs, General Counsel
George Washington University
Gelman Library Suite 701
2130 H Street N.W.
Washington, DC. 20037

OMB Watch

People for the American Way Foundation
Elliot M. Mincberg
2000 M Street N.W.
Suite 400
Washington D.C. 20036

Society of American Archivists

Special Libraries Association

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT 5

I. The Open Government Values of FACA Support Our Constitutional Democracy 5

A. The Constitutional Structure is Based on Open Government.....5

B. FACA Aims To Secure Public Confidence in the Integrity of Governmental Processes....8

1. FACA Aims To Prevent Private Groups From Exerting Secret Influence on Public Programs 9

2. FACA Provides the Public Accurate Information Concerning Executive Actions 11

3. FACA Does Not Impede Advisory Committees.....13

II. The Court Should Decline the Government's Invitation To Address The Separation of Powers Issue.....15

A. This Court Has Never Recognized the Immunity from Judicial Process That Petitioners Seek.....16

B. Discovery Can Accommodate Separation of Powers Concerns 19

III. Application of FACA to the NEPDG Would Not Disrupt the Separation of Powers 20

A. The Separation of Powers Is Based on Checks and Balances, Not Executive Primacy 21

B. The Constitutional Text Does Not Support Petitioners' Asserted Executive Prerogatives.....22

CONCLUSION 27

TABLE OF AUTHORITIES

CASES Page

American Foreign Serv. Assoc. v. Garfinkel,
490 U.S. 153 (1989).....15

Association of Am. Phys. & Surgeons, Inc. v. Clinton,
989 F. Supp. 8 (D.D.C. 1997).....18

Association of Am. Phys. & Surgeons, Inc. v. Clinton,
997 F.2d 898 (D.C. Cir. 1993).....23, 24

In re Cheney,
334 F.3d 1096 (D.C. Cir. 2003).....15

Clinton v. Jones,
520 U.S. 681 (1997).....16, 21

Clinton v. New York,
524 U.S. 417 (1998).....22

Grosjean v. American Press Co.,
297 U.S. 233 (1936).....8

In re Herring,
123 S. Ct. 2633 (2003).....18

Judicial Watch, Inc. v. NEPDG,
233 F. Supp. 2d 16 (D.D.C. 2002).....15, 16

Loving v. United States,
517 U.S. 748 (1996).....21, 22

Mistretta v. United States,
488 U.S. 361 (1989).....21

Morrison v. Olson,
487 U.S. 654 (1988).....19, 21

Myers v. United States,
272 U.S. 52 (1926).....6

National Anti-Hunger Coalition v. President's Private Sector Survey on Cost Control,
711 F.2d 1071 (D.C. Cir. 1983).....11

Natural Res. Def. Council v. Pena,
147 F.3d 1012 (D.C. Cir. 1998).....19

New York Times v. Sullivan,
376 U.S. 254 (1964).....8, 22

Nixon v. Administrator of Gen. Servs.,
433 U.S. 425 (1977).....16, 25

Nixon v. United States,
418 U.S. 683 (1974).....5

Public Citizen v. DOJ,
491 U.S. 440 (1989).....19, 25

Rosenbloom v. Metromedia, Inc.,
403 U.S. 29 (1971).....8

Thornhill v. Alabama,
310 U.S. 88 (1940).....8

United States v. Armstrong,
517 U.S. 456 (1996).....17, 18

United States v. Reynolds,
345 U.S. 1 (1953).....16, 18

Vaughn v. Rosen,
484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).....19

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952).....24

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST., art. II, § 2.....24

U.S. CONST., art. II, § 3.....23

5 U.S.C. App. 2, §§ 2(b).....9

5 U.S.C. App. 2, §§ 3(2).....14

5 U.S.C. App. 2, §§ 10.....9, 14

66 Fed. Reg. 27495 (May 17, 2001).....14

67 F.R. 5799 (Feb. 7, 2002).....14

68 F.R. 59644 (Oct. 16, 2003).....14

Executive Order No. 12,546,
51 Fed. Reg. 4475 (Feb. 3, 1986).....14

H.R. Rep. No. 92-1017 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491.....9, 10

S. Rep. No. 92-1098 (1972).....10

LAW REVIEWS AND JOURNALS

Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521.....5

Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1 (1981) 9

Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997) 9

Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) 11

Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) 18

Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957) 6

J. Gregory Sidak, *The Recommendations Clause*, 77 GEO. L. REV. 2079 (1989) 23

ADDITIONAL AUTHORITIES

Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations on S. 1637, S. 1964, and S. 2064, 92nd Cong., 1st Sess. (1971) 9

4 ANNALS OF CONGRESS (1794) 8

10 ANNALS OF CONGRESS (1798) 6

BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) 6, 7

CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS (Trenchard ed., 1971) 7

3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed., 1901) 5

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) 6

Department of Energy, National Petroleum Council Meeting Transcript (June 6, 2001) 13

Department of Energy, Secretary of Energy Advisory Board, A Report Card on the Department of Energy's Nonproliferation Programs with Russia (Jan. 10, 2001) 14

Federal Advisory Comm. Act Amendments of 1989: Hearing on S.444, 101st Cong., 1st Sess. (1989) 12, 15

FEDERAL ADVISORY COMMITTEE ACT: SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (1978) 9, 10

THE FEDERALIST No. 10 (Madison) 22

THE FEDERALIST No. 51 (Madison) 22

THE FEDERALIST No. 70 (Hamilton) 24

THE FEDERALIST No. 74 (Hamilton) 24

THE FEDERALIST No. 84 (Hamilton) 12

GAO Report, Mad Cow Disease, Improvements in the Animal Feed Ban and Other Regulatory Areas Would Strengthen U.S. Prevention Efforts (January 2002) 13

Hearings on the FACA and the President's AIDS Comm'n before the Senate Comm. on Global Affairs, 100th Cong., 1st Sess. (1987) 8

6 THE WRITINGS OF JAMES MADISON (G. Hunt ed., G.P. Putnam's Sons 1906) 7

9 THE WRITINGS OF JAMES MADISON (G. Hunt ed., G.P. Putnam's Sons 1910) 1

ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948).....6

National Petroleum Council, Securing Oil and Natural Gas Infrastructures in the New Economy (June 2001).....14

CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC (1953).....7

Senate Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations on S. 3067, 91st Cong., 2nd Sess. (1970)..... 12

INTERNET SOURCES

Clean Air Task Force, Scraping the "Bottom of the Barrel" for Power: A Rebuttal to the National Coal Council's Electricity Availability Report (November 2001), *available at* http://www.catf.us/publications/reports/bottom_of_the_barrel.php 13

Defenders of Wildlife, What the National Petroleum Council Won't Tell You About a Natural Gas "Crisis" (Sept. 25, 2003), *available at* http://www.defenders.org/releases/pr2003/pr092503a/html.....13

Department of Energy, Environmental Management Advisory Board, Public Meeting Minutes (Nov. 21-22, 2002), *available at* http://web.em.doe.gov/emab/Nov2002min.html. 13

Environmental Management Advisory Board, Public Meeting Minutes (Nov. 20-21, 2002), *available at* http://web.em.doe.gov/emab/Nov2002min.html 13

National Bioethics Advisory Commission 1998-1999 Biennial Report, *available at* http://www.fda.lgov/bbs/topics/NEWS/NEW00517.html12

The National Coal Council, Increasing Electricity Availability from Coal-Fired Generation in the Near-Term (May 2001), *available at* http://www.nationalcoalcouncil.org/Documents/May2001report-revised.pdf 13

National Petroleum Council, Balancing Natural Gas Policy: Fueling the Demands of a Growing Economy (Sept. 25, 2003), *available at* http://www.npc.org/.....13

Report of the Presidential Commission on the Space Shuttle Challenger Accident, *available at* http://history.nasa.gov/rogersrep/51lcover.htm. 14

Testimony on "Agent Orange: Status of the Air Force Ranch Hand Study" by Ronald Coene (Mar. 15, 2000), *available at* http://www.hhs.gov/asl/testify/t000315a.html.....12

www.fido.gov/facadatabase.....13

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Four national library associations, along with five public interest groups and one national archival association, respectfully submit this brief *amici curiae* in support of respondents Sierra Club and Judicial Watch, Inc. Pursuant to Supreme Court Rule 37.2(a), counsel for the parties have consented to the filing of this amicus brief.[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

All ten *amici curiae* represented in this brief have a significant interest in open government laws, including the Federal Advisory Committee Act ("FACA"). *Amici* share the conviction that broad access to government records protects values essential to representative democracy. *Amici* employ and rely on open government laws, including FACA, to facilitate full democratic participation. Public participation in government can be meaningful only if the people know what officials are doing and how they are doing it. Equally, without that information the people cannot hold public officials accountable. *Amici* urge that this Court reject the petitioners' claim that they may conduct the public's business in secret, and embrace the principle articulated by James Madison two centuries ago (9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed., G.P. Putnam's Sons 1910)):

---

[1] Pursuant to Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

> A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. . . . . And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

The American Association of Law Libraries is a nonprofit educational organization with over 5000 members nationwide whose mission is to promote and enhance the value of law libraries, to foster law librarianship, and to provide leadership and advocacy in the field of legal information and information policy.

The American Library Association is the oldest and largest library association in the world, with some 65,000 members and a mission to provide leadership in the development, promotion and improvement of library and information services in order to enhance learning and ensure access to information for all.

The Association of Research Libraries, a nonprofit organization of 123 research institutions, is dedicated to promoting equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship and community service.

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just and free America that ensures opportunity for all people.

Common Cause is a nonpartisan citizen activist group, with more than 250,000 members and 37 state chapters, which advocates for honest, open and accountable government, as well as citizen participation in government.

The National Security Archive is a nongovernmental research institute and library that collects and publishes declassified documents, obtained through the Freedom of Information Act and other open government laws, concerning United States foreign policy and national security matters.

OMB Watch is a nonprofit research and advocacy organization dedicated to promoting government accountability and citizen participation in policy decisions.

People for the American Way Foundation is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights, including the right of all citizens to an open government that avoids excessive and improper secrecy.

The Society of American Archivists provides services to and represents the professional interests of 3700 individual archivists and institutions as they work to identify, preserve and ensure access to the nation's historic record.

The Special Libraries Association is a nonprofit organization for information professionals and their strategic partners, and serves more than 12,000 members in the information profession, including corporate, academic and government information specialists.

SUMMARY OF THE ARGUMENT

Petitioners strain to conjure a constitutional collision among the branches of government from an unremarkable discovery dispute over records of the 2001 proceedings of the National Energy Policy Development Group ("NEPDG"). In so doing, they demand a broad executive prerogative to defy both the Federal Advisory Committee Act and judicial orders that require disclosure of formalized private participation in domestic policy making. Because the Vice President has refused to participate in discovery even to

assert executive privilege, this unprecedented assertion of executive prerogative arises virtually in the abstract, with neither an adequate factual record nor any meaningful consideration by the courts below of petitioners' insistence that the public has no right to know how its business is conducted.

This Court should not abandon for this case its ordinary standards for deciding constitutional questions, certainly not to serve petitioners' goal of making government less accountable. This brief examines three reasons why the decision below should be affirmed.

First, the goals of FACA, its mechanisms, and its underlying principles complement our constitutional plan of a democratic government protected by checks and balances among three coordinate branches. The Framers did not intend for any single branch to emerge triumphant over the others. Each branch is accountable to the others and to the people in some significant fashion – an accountability that is powerfully reinforced by the open government policies of FACA.

Second, although we do not understand why petitioners are so plainly spoiling for this constitutional confrontation, the emaciated record in this case provides a uniquely poor context in which to resolve large constitutional issues. Ordinary judicial processes allow the lower courts to supervise staged discovery that is sensitive to assertions of executive privilege. Petitioners have not even attempted to resolve through these ordinary judicial processes the dispute over what should be limited discovery into the threshold questions of whether and how FACA applies to the NEPDG. Instead, they press in a headlong rush for this Court to decide largely abstract constitutional issues, based on an incomplete and one-sided record. This Court should insist that petitioners engage the ordinary processes for the resolution of discovery disputes.

Third, were this Court to reach the separation of powers issue raised by petitioners, FACA should not be found unconstitutional. Requiring the executive to respond to judicial process works no material diminution of executive power. Nor is the executive branch improperly hobbled by having to disclose the identity of private citizens who serve on advisory committees and thus become part of the government's formal making of public policy. Such disclosures and accountability are not inconsistent with the very modest powers conferred by the Opinions and Recommendations Clauses of Article II, and disturb no essential executive functions.

ARGUMENT

I. The Open Government Values of FACA Support Our Constitutional Democracy.

Petitioners ignore the democratic values embodied in the Constitution when they disdain ordinary judicial process, asserting that "respondents [do not] have any meaningful need for the information that they seek." Br. for Petitioners at 46. Public accountability – not executive prerogative – is the genius of our constitutional system. *See Nixon v. United States*, 418 U.S. 683, 706 (1974). The Framers intended that government should operate in secret only "when it would be fatal and pernicious to publish the schemes of government." 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 233 (J. Marshall) (J. Elliot ed., 1901). FACA supports and strengthens that core constitutional value of an open, accountable democracy.

A. The Constitutional Structure Is Based on Open Government.

In eighteenth-century America, the view was widely held that public participation in government could check the behavior of political actors. *See* Vincent Blasi, *The*

Checking Value in First Amendment Theory, 1977 AM. BAR FOUND. RES. J. 521, 529; BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167 (1967). The legislative need for access to public records was known well to the signers of the Declaration of Independence. In its specification of King George's "repeated injuries and usurpations," that document listed the practice of convening legislatures "at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The Constitution incorporates the idea that representative democracy can succeed only if information about government is broadly available. *See* Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 6-14 (1957); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 13-16 (1948). The Framers understood that secrecy is antithetical to representative government: "In Governments like ours, where all political power is derived from the people, and whose foundations are laid in public opinion, it is essential that the people be truly informed of the proceedings, the motives, and views of their constituted authorities." 10 ANNALS OF CONGRESS 930-31 (1798) (statement of Mr. Rutledge).

The public's right to know, inherent in any system of self-governance, is reflected in the structure of the Constitution. Refusing to grant absolute power to any office or person, the Framers chose a system of balanced tension among the branches of government (*Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)):

> The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

The First Amendment also is designed to check governmental power. Among the most influential political sources in the colonial period were the pseudonymous essays of Cato. *See* CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953); BAILYN, *supra* p. 6, at 36. Cato's celebrated letter "Of Freedom of Speech" stressed how important transparency in public affairs is for representative government:

> And as it is the Part and Business of the People, for whose Sake alone all publick Matters are, or ought to be, transacted, to see whether they be well or ill transacted; so it is the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publickly scanned.

Cato's Letters No. 15, Of Freedom of Speech: That the same is inseparable from Public Liberty (Feb. 4, 1720), *reprinted in* CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 97 (Trenchard ed., 1971).

Madison, draftsman of the First Amendment, stressed that public access to government information safeguards popular sovereignty: "[T]he right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right." 6 THE WRITINGS OF JAMES MADISON 398 (G. Hunt ed., G.P. Putnam's Sons 1906). Writing for the Virginia General Assembly, Madison condemned the Alien and Sedition Acts

of 1798 as "a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." *Id.* at 359; *see also New York Times v. Sullivan*, 376 U.S. 254, 274-76 (1964) (public hostility to Alien and Sedition Acts).

This Court has long acknowledged that access to information is necessary to our democracy. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41-43 (1971) (discussing relationship between access to information and self-governance); *Thornhill v. Alabama*, 310 U.S. 88, 95, 102 (1940) (same). As cautioned in *Grosjean v. American Press Co.*, 297 U.S. 233, 247 (1936), "'The liberty of opinion keeps governments themselves in due subjection to their duties.'" (quoting Erskine's Speeches, High's Ed., Vol. I at 525). Madison, again, captured the essence of the experiment in democracy in which he played so great a role (4 ANNALS OF CONGRESS 934 (1794)):

> If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.

B. FACA Aims To Secure Public Confidence in the Integrity of Governmental Processes.

FACA fortifies the constitutional commitment to open government, serving as "one of the four pillars of open-government laws." *Hearings on the FACA and the President's AIDS Comm'n before the Senate Comm. on Global Affairs*, 100th Cong., 1st Sess. 67 (1987) (statement of Sen. Glenn) (referring also to the Freedom of Information Act, the Administrative Procedure Act, and the Sunshine Act). Congress intended that FACA would, with certain

specified exceptions, keep the public informed of advisory committee activities by requiring committees to give advance notice of meetings, hold all meetings in public, keep detailed minutes, and make their records available to the public. 5 U.S.C. App. 2, §§ 2(b), 10(a)-(c). The requirements of FACA thus directly reinforce the representative democracy embraced by the Framers.

1. FACA Aims To Prevent Private Groups From Exerting Secret Influence on Public Programs.

Beginning in the 1940s and 1950s, the Department of Justice implemented guidelines, and Congress considered legislation, addressing advisory committees that often were convened by federal agencies. *See* Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 2 (1981); FEDERAL ADVISORY COMMITTEE ACT: SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 46-48 (1978) [hereinafter FACA Source Book]. An apprehension grew that industry participation on certain advisory committees was fostering private dominance over public business. This apprehension – focused on the Advisory Council on Federal Reports, the National Industrial Pollution Control Council, and the National Petroleum Council – spurred enactment of FACA.[2] Before FACA, critics charged that private interests were secretly capturing public policy by controlling the flow of advice and

---

[2] *See Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations on S. 1637, S. 1964, and S. 2064*, 92nd Cong., 1st Sess. 345-402, 555-79 (1971) ["Sen. Hearings"]; H.R. Rep. No. 92-1017, at 4 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496; Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 462-64 (1997).

knowledge to policymakers. *See, e.g.*, Sen. Hearings at 346-47, 350-52, 372, 411-12, 495.

Opening the hearings that led to the passage of FACA, Senator Metcalf stated (FACA Source Book 154):

> What we are dealing with, in these hearings, goes to the bedrock of Government decision making. Information is an important commodity in this capital. Those who get information to policymakers, or get information from them, can benefit their cause, whatever it may be. Outsiders can be adversely and unknowingly affected. And decision-makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings – and could not get in the door if they did – may not make tempered judgments. We are looking at two fundamentals, disclosure and counsel, the rights of people to find out what is going on and, if they want, to do something about it.

Before approving FACA, Congress made extensive findings about the advisory committee process. Congressional testimony disclosed that many advisory committees "operate[d] in a closed environment," affording the public little or no opportunity to learn about their deliberations or recommendations. S. Rep. No. 92-1098, at 6 (1972), *reprinted in* FACA Source Book 156. This "lack of public scrutiny of the activities of advisory committees . . . pose[d] the danger that subjective influences not in the public interest could be exerted on the Federal decision-makers." *Id.* A 1972 House report found (1972 U.S.C.C.A.N. 3491, 3496):

> [O]ne of the great dangers in this unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony . . . pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests.

With FACA, Congress pulled aside the veil of secrecy, opening "to public scrutiny the manner in which government agencies obtain advice from private individuals." *National Anti-Hunger Coalition v. President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983). The statute improves the ability of citizens and their representatives to participate in public discussions concerning government policy and to hold officials accountable for their decisions.

2. FACA Provides the Public Accurate Information Concerning Executive Actions.

The powers of the modern Executive Branch exceed anything the Framers could have imagined. *See generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996). As the executive branch has grown, the public increasingly has come to rely on the media and citizen organizations to maintain vigilance over official misconduct. Open government statutes such as FACA are indispensable aids to historians, journalists, and watchdog and advocacy groups that serve as the contemporary analogue to Hamilton's "citizens who inhabit the country at and near the seat of government . . . [and who] stand ready to sound the alarm when necessary, and to point out the actors in any

pernicious project." THE FEDERALIST No. 84, at 516 (Hamilton) (Clinton Rossiter ed., 1961).

Prior to FACA, "the interested public often couldn't even find out about the activities of a committee supposedly representing their views to the Federal Government." *Federal Advisory Committee Act Amendments of 1989: Hearing on S.444,* 101st Cong., 1st Sess. 6 (1989) (statement of Sen. Heinz). The absence of specified repositories for advisory committee materials meant that often their records were "lost" to the public and to history. *See Senate Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations on S. 3067*, 91st Cong., 2nd Sess. 32 (1970). As then-EPA Administrator William Ruckleshaus observed in 1971, some advisory committees adopted the attitude of reaching decisions from a "quiet spot" beyond the public view, neglecting any obligation to justify their decisions to other officials and to the public. *See Senate Hearings*, *supra* p. 9 n.2, at 776.

FACA has proved an effective tool for securing public access to advisory committee meetings and for making their records readily accessible to the public and researchers. Advisory committees convened under FACA have grappled with a wide range of public issues, including epidemiological surveys of Vietnam veterans exposed to Agent Orange, the prevention of mad cow disease, ethical issues in stem-cell research, and the safety of dietary supplements.[3] FACA ensures that the deliberations and

---

[3] *See* Testimony on "Agent Orange: Status of the Air Force Ranch Hand Study" by Ronald Coene (Mar. 15, 2000), *available at* http://www.hhs.gov/asl/testify/t000315a.html; GAO Report, Mad Cow Disease, Improvements in the Animal Feed Ban and Other Regulatory Areas Would Strengthen U.S. Prevention Efforts 28 (January 2002); National Bioethics Advisory Commission 1998-1999 Biennial Report, at 1, *available at* http://www.fda.lgov/bbs/topics/NEWS/NEW00517.html.

conclusions of those and other advisory committees are subject to public scrutiny and inform public debate.[4] Public meeting minutes provide information about agency priorities, resource allocation, and practices. *See, e.g.*, Environmental Management Advisory Board, Public Meeting Minutes (Nov. 20-21, 2002), *available at* http://web.em.doe.gov/emab/Nov2002min.html (Department of Energy environmental cleanup policies and strategies).[5]

3. FACA Does Not Impede Advisory Committees.

---

[4] *Compare* The National Coal Council, Increasing Electricity Availability from Coal-Fired Generation in the Near-Term (May 2001), *available at* http://www.nationalcoalcouncil.org/Documents/May2001report-revised.pdf *with* Clean Air Task Force, Scraping the "Bottom of the Barrel" for Power: A Rebuttal to the National Coal Council's Electricity Availability Report (November 2001), *available at* http://www.catf.us/publications/reports/bottom_of_the_barrel.php; *compare* National Petroleum Council, Balancing Natural Gas Policy: Fueling the Demands of a Growing Economy (Sept. 25, 2003), *available at* http://www.npc.org/ *with* Defenders of Wildlife, What the National Petroleum Council Won't tell You About a Natural Gas "Crisis" (Sept. 25, 2003), *available at* http://www.defenders.org/releases/pr2003/pr092503a/html; *see also* Department of Energy, National Petroleum Council Meeting Transcript 60-61 (June 6, 2001) (describing public interest in Natural Gas Policy report; on file with counsel for *amici*); Department of Energy, Environmental Management Advisory Board, Public Meeting Minutes (Nov. 21-22, 2002), *available at* http://web.em.doe.gov/emab/Nov2002min.html.

[5] Advisory committee information, including charters and member lists, is available online at www.fido.gov/facadatabase (last visited Mar. 10, 2004).

The rules established by FACA are straightforward. With exceptions not applicable here, an "advisory committee" "established or utilized by the President" (i) must provide timely notice of its meetings, which (ii) must be open to the public, with (iii) all transcripts and records of its actions preserved. 5 U.S.C. App. 2, §§ 3(2), 10(a)(1)&(2); 10(b).

Advisory committees convened to analyze energy issues regularly comply with FACA. *See, e.g.*, Advisory Committee on Reactor Safeguards, 68 FR 59644 (Nuclear Reg. Comm'n Oct. 16, 2003); Environmental Management Advisory Board Meeting 67 FR 5799 (Dep't of Energy Feb. 7, 2002) (Alternative Technologies to Incineration Committee); National Petroleum Council, Securing Oil and Natural Gas Infrastructures in the New Economy 1 (June 2001) (report of FACA-governed committee originally chaired by petitioner Cheney while still in private industry); National Petroleum Council, 66 Fed. Reg. 27495 (May 17, 2001) (notice of public meeting to consider proposed final national energy infrastructure report). Moreover, FACA has applied to numerous high-profile commissions – without any recorded injury to the executive branch – such as studies of nuclear nonproliferation programs with Russia,[6] and the Challenger space shuttle explosion.[7]

---

[6] Department of Energy, Secretary of Energy Advisory Board, A Report Card on the Department of Energy's Nonproliferation Programs with Russia (Jan. 10, 2001) (co-chaired by Howard Baker and Lloyd Cutler).

[7] *See* Exec. Order No. 12,546, 51 Fed. Reg. 4475 (Feb. 3, 1986); Report of the Presidential Commission on the Space Shuttle Challenger Accident, *available at* http://history.nasa.gov/rogersrep/51lcover.htm.

That the issues addressed by the NEPDG are of vital public interest is no ground for excluding it from compliance with FACA. Indeed, high public interest in the NEPDG sharpens the need for public access to information about it. By providing for public oversight of advisory committees, FACA aims to prevent "uninformed speculation" about the membership, cost, and recommendations of advisory committees. *See Federal Advisory Committee Act Amendments of 1989: Hearing on S.444*, 101st Cong., 1st Sess. 6 (statement of Sen. Heinz). In most cases – though, sadly, not in this one – such disclosures will eliminate the need for litigation to learn about the actions of public officials. *See* Br. for Petitioners at 15. In all of these aspects, FACA serves the constitutional democracy that the Framers built on three coordinate branches of government. All of these considerations counsel strongly against petitioners' attempt to circumvent the law by raising separation of powers issues, and counsel in favor of returning the case to the district court for the threshold determination whether the NEPDG is covered by FACA.

II. The Court Should Decline the Government's Invitation To Address The Separation of Powers Issue.

Although petitioners devote most of their brief to the separation of powers, that constitutional question is poorly presented on a record that is sharply limited by the Vice President's refusal to engage in ordinary discovery processes. The Court should follow here its usual policy of not "pronounc[ing] upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so." *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989).

Discovery is needed because the scanty record, including the affidavit of Karen Knutson offered by petitioners, does not "resolve the question of whether and

how FACA is applicable to NEPDG." *Judicial Watch, Inc. v. NEPDG*, 233 F. Supp. 2d 16, 30 (D.D.C. 2002). Discovery might be quite limited. *See In re Cheney*, 334 F.3d 1096, 1105-07 (D.C. Cir. 2003). Plaintiffs' allegations might be answered by a document production (subject to a suitable protective order) consisting only of attendance-related records for the NEPDG meetings. Any supposedly privileged records could be reviewed first *in camera*. Petitioners' refusal to participate in the judicial process necessarily precipitated a collision with the other two branches, but the actual confrontation is too contrived and too poorly grounded for this Court to decide it responsibly.

A. This Court Has Never Recognized the Immunity from Judicial Process That Petitioners Seek.

As the trial court recognized, the government's position is that it may skip ordinary judicial process through the *ipse dixit* of its officials: "What you're telling me is that there are no factual disputes of any kind here because we say there's no factual dispute. . . . . That's an incredible statement." *Judicial Watch, Inc. v. NEPDG*, No. CA 01-1530 (EGS), Hr. Trans. at 22 (Feb. 13, 2002). The government's position ignores this Court's rulings on the amenability of Executive officials to judicial process. "[T]he regulation and mandatory disclosure of documents in the possession of the Executive Branch . . . has never been considered invalid as an invasion of [executive] autonomy." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

Even the President cannot avoid judicial process by invoking an undifferentiated claim of burden on executive operations. *See Clinton v. Jones*, 520 U.S. 681 (1997). Officials inferior to the President certainly enjoy no greater rights to evade judicial process. *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953) ("Judicial control over the evidence

in a case cannot be abdicated to the caprice of executive officers . . . .").

By disdaining judicial processes, petitioners have ensured that the only materials in the impoverished "record" are either untested affidavits crafted by executive officials and their counsel, or documents from non-White House offices that have been heavily redacted by executive officials and counsel. It is no surprise that petitioners argue that such a one-sided record supports their position. All litigants would covet the right asserted by petitioners to control everything the courts may know about the facts of a case.

Petitioners attempt to justify this idiosyncratic version of the adversary process by claiming they are entitled to a presumption of regularity in their actions. They seek to employ that presumption to prevent any judicial inquiry into the performance of executive functions. Br. for Petitioners at 28. The case principally cited for this supposed presumption provides little support for it. *United States v. Armstrong*, 517 U.S. 456, 465 (1996), stated two reasons for courts to defer to prosecutorial discretion in bringing a criminal action. First, the Court observed that such deference flowed from the "relative competence of prosecutors and courts" in evaluating the "strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Id.* at 465. Second, the Court expressed concern that judicial intrusion into prosecutorial decision-making could "chill law enforcement." *Id.*

For federal advisory committees, in contrast, there is no question of relative competencies of the Congress and the President. After decades of oversight, Congress directed in FACA that in specified circumstances, advisory committees should meet public-access and reporting requirements. Congress was entirely competent to do so. Moreover, nothing in FACA should "chill" the exercise of executive

functions. The President remains free to obtain confidential advice from executive branch officials, or from private individuals. FACA applies only if he or other executive officials choose to establish a formal policy-advising body with private participants. This imposes no material burden on Article II powers. *See* pp. 22-26, *infra*.[8]

As the Framers surely would have, this Court should take a skeptical view of any presumption that an executive officer will never seek to circumvent judicial process through artful affidavits. *See* Br. for Petitioners at 28-29. In *Reynolds*, 345 U.S. at 4-6, this Court relied on affidavits filed by Air Force officials that disclosure of certain documents would compromise national security. As described in a Motion for Leave to file a Petition for Writ of Error *Coram Nobis* filed fifty years later, the now-declassified documents reveal that the affidavits were false, and the documents nowhere referred to national security matters.[9] Without suggesting that the factual statements made by government officials in this case are accurate or not, *Reynolds* underscores the profound importance of adversarial testing of government claims that information may be withheld from disclosure. *See also Association of Am. Phys.*

---

[8] In any event, the government may well be wrong in equating prosecutorial discretion in *Armstrong* with core executive branch activities. Prosecution was not a "core" executive function within the original meaning of the Constitution. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14-22 (1994) (prosecutors were not necessarily answerable to President until at least 1861; prosecutorial authority was not within the exclusive domain of the executive branch during early period of republic).

[9] *See Herring v. United States*, Civ. No. 2:03-05500-LDD (E.D. Pa. Oct. 1, 2003) (Complaint ¶¶ 23-30); *In re Herring*, 123 S. Ct. 2633 (2003) (denying motion).

& Surgeons, Inc. v. Clinton, 989 F. Supp. 8, 9-12 (D.D.C. 1997) (finding that White House official's affidavit was misleading).

B. Discovery Can Accommodate Separation of Powers Concerns.

Even if this Court were to determine that the district court's discovery plan implicates separation of powers concerns, discovery should proceed under court supervision. Any risk of intruding on executive powers must be balanced against the important goals of FACA. *Cf. Public Citizen v. DOJ*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 695 (1988). That balance can be achieved by affording plaintiffs limited discovery to resolve the threshold questions of whether and how FACA applies to the NEPDG. *Cf. Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998) (permitting limited discovery in FACA action to resolve standing issue). Disclosure of who participated in NEPDG meetings would threaten no material encroachment on executive deliberations.

Judicial application of the Freedom of Information Act illustrates how courts can shape discovery to avoid unnecessary burdens. To permit challenges to exemptions claimed under that statute without compromising the assertedly confidential nature of materials at issue, courts require that the government provide an itemized "index" of withheld documents that describes each record or withheld portion and the grounds for withholding each. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). *Vaughn* stressed that "It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.* at 826.

Courts can follow analogous discovery procedures under FACA. Threshold discovery can permit disclosure of very specific aspects of an advisory committee's operation without disclosing the content of any discussions. In this case, for example, discovery could begin with the disclosure of records that would reflect whether private parties such as energy company executives attended NEPDG meetings. Such initial disclosures might well provide sufficient information for the parties and the District Court to determine whether FACA applies, or whether some further discovery is warranted.

The government misunderstands FACA when it insists that this case must be dismissed unless plaintiffs can present verifiable proof – before any discovery – that industry executives and lobbyists participated in NEPDG. FACA places the burden of disclosure on the government. By starting with discovery of who attended NEPDG meetings, the trial court may be able to resolve the case entirely, or may determine to allow further discovery, subject to any assertions of executive privilege. Such a deliberate course would balance the open government principles of FACA and of the Constitution against any legitimate executive branch concerns.

III. Application of FACA to the NEPDG Would Not Disrupt the Separation of Powers.

Even if this Court were to reach the separation of powers issue raised by Petitioners, FACA should not be found unconstitutional. By refusing to participate in ordinary judicial processes, the government claims an unprecedented authority in the domestic arena. There is no textual basis in the Constitution for the government's contention – without any assertion of executive privilege – that compliance with discovery necessarily will injure the separation of powers. To the contrary, in inter-branch disputes this Court has long approved the assertion of

executive privilege through ordinary litigation processes, thereby providing a sufficient vehicle for assertion of executive interests. Petitioners offer no adequate basis for the Court to repudiate this deliberate approach in favor of the blanket executive prerogatives they demand.

A. The Separation of Powers Is Based on Checks and Balances, Not Executive Primacy.

In responding to claims of executive power in the domestic sphere, this Court has employed a balancing approach. "[S]eparation of powers does not mean that the branches 'ought to have no partial agency in, or no control over the acts of each other.'" *Clinton v. Jones*, 520 U.S. at 703 (quoting THE FEDERALIST No. 47 (Madison) (J. Cooke ed., 1961)); *see also Loving v. United States*, 517 U.S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes."); *Morrison*, 487 U.S. at 693-94 (rejecting rigid division of powers between branches). Instead, the Court examines whether the challenged act of a co-equal branch impermissibly undermines the power of the executive to accomplish its constitutional functions.

In *Mistretta v. United States*, this Court summarized the "pragmatic, flexible view" of the separation of powers (488 U.S. 361, 381 (1989) (citing THE FEDERALIST No. 51, at 349 (Madison) (J. Cooke ed., 1961)):

> In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny — the accumulation of excessive authority in a single Branch — lies not in a hermetic

> division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.

The Framers believed that individuals, motivated by self-interest and the force of faction, are often untrustworthy. THE FEDERALIST No. 10 (Madison). "If men were angels, no government would be necessary"; indeed, "If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST No. 51, at 319 (Madison) (Clinton Rossiter ed., 1961).

Consequently, the Framers refused to entrust absolute power to a single individual like the English King. By dividing the federal government into three branches, each with its own sphere of powers and interests and each with some means of checking and balancing the others, the Framers sought to prevent the exercise of arbitrary power. *See Loving*, 517 U.S. at 756-57; *New York Times v. Sullivan*, 376 U.S. at 269-76. Indeed, viewing secrecy in government as an instrument of tyranny, the Framers insisted that representative government must be open to public observation. *See* pp. 5-7, *supra*. Thus, the separation of powers was first and foremost a reaction *against* the concentration of power. Congress enacted FACA to ensure public oversight of executive functions, consistent with Madison's admonition that "ambition must be made to counteract ambition" in order that one branch not usurp the powers of the others. THE FEDERALIST No. 51, at 319 (Madison) (Clinton Rossiter ed., 1961).

B. The Constitutional Text Does Not Support Petitioners' Asserted Executive Prerogatives.

The constitutional text provides no basis for the government's assertion that the executive is free to ignore FACA. As held in *Clinton v. New York*, 524 U.S. 417, 438

(1998), "There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." To support their bid to expand executive prerogatives, petitioners turn to the Recommendations and Opinions Clauses of Article II. Those modest textual provisions reinforce the view that nothing in this case threatens harm to valid executive interests.

The Recommendations Clause states that the President "shall . . . recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient." U.S. CONST., art. II, § 3. This unremarkable power – which certainly would exist even if not included in the text – is in no way threatened by announcing those private individuals who participate on advisory committees, or disclosing the proceedings of such groups. Moreover, as Judge Silberman wrote in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993), the Recommendations Clause provides a "somewhat artificial" basis for challenging the constitutionality of FACA, as almost any policy advice to the President carries with it the possibility of legislative recommendation.

Petitioners nonetheless assert that application of FACA to the NEPDG would "inhibit, confine, or control the process th[r]ough which the President formulates the legislative measures he proposes or the administrative actions he orders." Br. for Petitioners at 15. This assertion is a false alarm. The statute provides solely that the public must know when private interests become part of a formal process for recommending public policy, so it can follow that process. *See* J. Gregory Sidak, *The Recommendations Clause*, 77 GEO. L. REV. 2079, 2091-92 (1989). Nothing in those elements of FACA has a material impact on the President's ability to make recommendations to Congress.

Rather, FACA achieves the public accountability that Hamilton recognized is essential for representative government:

> It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, but the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

THE FEDERALIST No. 70, at 426 (Hamilton) (Clinton Rossiter ed., 1961). As Judge Silberman noted, for thirty years since FACA was enacted, Presidents have received confidential advice and proposed legislation without complaint about FACA-imposed procedures. *See* 997 F.2d at 908.

The Opinions Clause provides even less support for petitioners, stating only that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. CONST., art. II, § 2. As Justice Jackson wrote, this describes a "trifling" power which is "inherent in the Executive if anything is." *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 & n.9 (1952) (Jackson, J., concurring). Hamilton concurred

in this view: "This [the Opinions Clause] I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office." THE FEDERALIST No. 74, at 447 (Clinton Rossiter ed., 1961).

FACA in no way prevents the President from exercising his Opinions Clause powers. The Act applies only where advisory committees are composed of members *other* than public officials, leaving the President entirely free to obtain written opinions from his cabinet officers. Indeed, the Act specifically exempts from its coverage any "individuals" and committees composed solely of "principal" officers of agencies.

Because these textual provisions are so mild, petitioners here can assert only "general" or "inherent" executive powers.[10] As Justice Kennedy observed in his concurring opinion in *Public Citizen*, 491 U.S. at 484, where only such general executive powers are asserted, the appropriate question is whether the challenged legislation is justified to promote objectives within the authority of

---

[10] The Appointments Clause, referred to by petitioners in a glancing manner, is actually protected and reinforced by plaintiffs' suit. Plaintiffs do not challenge the President's appointment of cabinet-level and other executive branch employees to the NEPDG. Rather, they have acted out of concern that de facto committee members may have improperly influenced the advice to the President. Thus, they seek to vindicate his formal appointments and determine whether they were undermined by de facto members. *Cf. Public Citizen*, 491 U.S. at 467 (Kennedy, J., concurring) (separation of powers inquiry depends on nature of executive power at issue).

Congress. FACA's open government objective plainly is within the authority of Congress.[11]

---

[11] Petitioners' constitutional claims could be resolved by the analysis in *Nixon v. Administrator of General Services.*, *supra*, where former President Nixon challenged legislation seizing his official papers, contending that the statute interfered in executive branch matters. *See* 433 U.S. at 440. Rejecting that argument, this Court stressed that the executive branch (though not Nixon) would retain custody and screening of the materials, allowing disclosures to be opposed on the basis of legal rights or privileges. *See id.* at 443-44. FACA provides analogous protections. The executive branch initially determines whether to apply the Act, whether to invoke its explicit exemptions from coverage, or whether to assert executive privilege.

CONCLUSION

For all of these reasons, *amici* respectfully urge the Court to return the matter to the district court for discovery to proceed.

Respectfully submitted,

DAVID OVERLOCK STEWART
Counsel of Record
THOMAS M. SUSMAN
THOMAS W. BEIMERS
ROPES & GRAY LLP
One Metro Center
700-12th Street N.W.
Suite 900
Washington, D.C. 20005
(202) 508-4600

March 11, 2004

(9)

Supreme Court, U.S.
FILED
MAR 11 2004
OFFICE OF THE CLERK

No. 03-475

In the

Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENTS

LUCY A. DALGLISH, ESQ.
Counsel of Record
GRANT D. PENROD, ESQ.
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1815 N. Fort Myer Dr., Suite 900
Arlington, Virginia 22209
(703) 807-2100

(additional counsel for amici listed on inside cover)

BEST AVAILABLE COPY

ADDITIONAL COUNSEL FOR AMICI:

RICHARD M. SCHMIDT, JR., ESQ.
KEVIN M. GOLDBERG, ESQ.
COHN AND MARKS LLP
1920 North Street, NW, Suite 300
Washington, DC 20036
Counsel for American Society of Newspaper Editors

BRUCE W. SANFORD, ESQ.
ROBERT D. LYSTAD, ESQ.
BRUCE D. BROWN, ESQ.
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW, Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The public's and news media's substantial interest in the application of the Federal Advisory Committee Act to the National Energy Policy Development Group outweighs the minimal infringement FACA places on executive power .. 3

A. The application of FACA to the NEPDG is not unconstitutional 4

1. Not every interference with executive power is a violation of the principle of separation of powers 4

2. The executive interest in receiving confidential advice is only minimally infringed by the application of FACA to the NEPDG 8

3. Complete immunity from discovery is unnecessary because there are other means of protecting the executive interest 11

B. The public and the news media have an important interest in the application of FACA to NEPDG meetings 13

II. The administrative record is not an adequate basis upon which to decide this case 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Association of American Physicians v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) 8, 14, 18

Association of American Physicians v. Clinton, 879 F. Supp. 106 (D.D.C. 1994) 17

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 16, 17

Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1 (D.C. Cir. 1998) 16, 17

Community for Creative Non-Violence v. Lujan, 908 F.2d 992 (D.C. Cir. 1990) 16

Dellums v. Powell, 561 F.2d 242 (D.C. Cir. 1977) ... 7, 12

Dellums v. Powell, 642 F.2d 1351 (D.C. Cir. 1980) 7

Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974) 13

Gates v. Schlesinger, 366 F. Supp. 797 (D.D.C. 1973) 13-14

In re Cheney, 334 F.3d 1096 (D.C. Cir. 2003) .. 12, 14, 18

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1980) 7, 10, 11, 12, 13

Judicial Watch, Inc. v. National Energy Policy Development Group, 219 F. Supp.2d 20 (D.D.C. 2002) 14, 15, 18

Morrison v. Olson, 487 U.S. 654 (1988) 4, 6, 7, 11

National Anti-Hunger Coalition v. Executive Committee, 711 F.2d 1071 (D.C. Cir. 1983) 9, 17

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 4, 6, 11, 18

Public Citizen v. United States Department of Justice, 491 U.S. 400 (1989) 10, 11, 14

United States v. Nixon, 418 U.S. 683 (1974) 4-6, 7, 8, 11, 12

U.S. Constitution, Statutes and Rules

U.S. Const. Art. II, § 2, Cl. 1 8

U.S. Const. Art. II, § 2, Cl. 2 10

U.S. Const. Art. II, § 3 8

Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* 16

All Writs Act, 28 U.S.C. § 1361 16

Federal Advisory Committee Act, 5 U.S.C. App. 1 ..... *passim*

Fed. R. Civ. Pro. 11(c) 12

Fed. R. Civ. Pro. 26(b)(2) 12

Fed. R. Civ. Pro. 26(c) 12

Fed. R. Civ. Pro. 26(g) 12

INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation since 1970.

The American Society of Newspaper Editors is a non-profit organization founded in 1922. It has a nationwide membership of approximately 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

---

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

The media groups' interest in this case is in preserving the uninhibited exchange of information and access to federal government records. *Amici* submit this brief in support of the respondents' argument that the Federal Advisory Committee Act, 5 U.S.C. App. 1, is not unconstitutional as applied to the activities of the National Energy Policy Development Group. *Amici* also support respondents' argument that jurisdiction need not lie with the Supreme Court at this time, and that the case should be remanded to the District Court for development of these issues.

SUMMARY OF ARGUMENT

Amici support respondents Judicial Watch's and Sierra Club's argument that application of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 1, to the National Energy Policy Development Group ("NEPDG") is not unconstitutional. *Amici* further urge that the administrative record is an inadequate basis upon which to decide this case, and that the case be remanded to the District Court to proceed with discovery and resolution of the constitutional issues.

Open government laws such as the Freedom of Information Act and the Federal Advisory Committee Act are of vital importance to an informed citizenry and a free press. These laws provide two of the only windows into the actions of the federal government that acts in the public's name and with the public's funds. To a great extent, the public relies on the press as a conduit for this information.

Although the Federal Advisory Committee Act as interpreted by the courts imposes at most a minimal infringement upon confidential executive communications, the petitioners have launched a broad constitutional attack on the Act as a

violation of the doctrine of separation of powers. This argument ignores the precedents of this Court, which require that the Act's slight intrusion on executive communications be weighed against its vital importance to the press and the public.

ARGUMENT

I. The public's and news media's substantial interest in the application of the Federal Advisory Committee Act to the National Energy Policy Development Group outweighs the minimal infringement FACA places on executive power.

The public's interest in the workings of the NEPDG is very great. As discussed in I.B. below, this is both so that the public may be properly informed about the recommended energy policy, and so that it may be assured that the policy is not the subject of undue influence from any particular interest. The news media's interest is therefore also great as they are the public's primary means of access to this information.

In contrast, as discussed in I.A. below, the petitioners' interest – in not just withholding information on the basis of executive privilege, but in being wholly exempted from discovery – is very slight. Such an interpretation of the doctrine of separation of powers and executive privilege not only totally ignores the doctrine of checks and balances, but would render FACA ineffective or useless. All the government would have to do to hide the activities of an advisory committee from the news media and the public would be toassociate it with upper-level executive officials, and no court could even look behind that assertion into the actual workings of the committee.

A. The application of FACA to the NEPDG is not unconstitutional.

The application of the Federal Advisory Committee Act to the National Energy Policy Development Group is not an "extreme interference with core Article II responsibilities," as petitioners assert. Brief of petitioners, at 43. This application of FACA to the NEPDG is only a minimal infringement on powers that are not exclusive to the President under Article II.

Furthermore, there are a number of protections of these executive powers available in this case, other than a complete bar on discovery. These protections include, but are not limited to, executive privilege and all of the normal litigation mechanisms designed to protect parties from abuse of discovery, such as *in camera* review, sealing and sanctions. The existence of these protections makes the broad immunity from discovery requested by petitioners unnecessary and inappropriate.

In cases such as this, where the constitutional power in question is minimally infringed, the Court has held that a balancing test between the asserted executive interest and the legislative interest in the conflicting statute is appropriate. *United States v. Nixon*, 418 U.S. 683, 706 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *Morrison v. Olson*, 487 U.S. 654, 691-5 (1988).

1. Not every interference with executive power is a violation of the principle of separation of powers.

The principle of separation of powers is not implicated by every statute that works some interference, no matter how

minor, with executive power. This Court has established that a balancing test between the legislative interest in enacting the infringing statute and the infringement on executive power is appropriate.

In *United States v. Nixon*, 418 U.S. 683 (1974)(*Nixon I*), the Court rejected a broad claim of executive immunity similar to the one asserted by petitioners in this case. President Richard Nixon had been issued a subpoena in a criminal trial to produce executive papers and records of meetings, and attempted to quash the subpoena on the grounds that it was an unconstitutional judicial infringement on executive privilege. *Id.* at 688.

The Court first rejected President Nixon's contention that it was beyond the power of the judiciary to review a claim of executive privilege, holding that "any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *Id.* at 703-4.

The Court held that executive privilege was subject to balancing against other interests, and that, while important, confidentiality in executive privilege was not absolutely protected by the Constitution. *Id.* at 705-6.

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality

> of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security interests, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

Id. at 706. The Court specifically did not address the balance between executive privilege and the need for relevant evidence in civil litigation, *Id.* at 712, n.19, but it remains that executive privilege must be weighed against other interests.

The Court reiterated this balancing of interests in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (*Nixon II*), when President Nixon invoked separation of powers and executive privilege in opposition to the application of the Presidential Recordings and Materials Preservation Act. "[T]he proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its Constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.* at 443 (internal citation omitted).

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court again rejected the idea that any infringement on executive power by the legislature or the judiciary violated the principle of separation of powers. While the Ethics in Government Act placed limits on the executive control over the independent counsel, an executive official, when taken as whole the Act did not violate separation of powers because it did not involve

an attempt to increase legislative or judicial power at the expense of the executive. *Id.* at 693-5. "The final question to be addressed is whether the Act, taken as a whole, violates separation of powers by *unduly* interfering with the role of the Executive Branch." *Id.* (emphasis added).

Lower courts have followed this lead in applying a balancing test when legislation works some infringement upon executive communications. In *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977)(*Dellums I*)(*cert. denied*, *Nixon v. Dellums*, 434 U.S. 880 (1977)), the U.S. Court of Appeals for the District of Columbia Circuit weighed President Nixon's interest in executive privilege against the plaintiff's need for evidence in a civil trial. The Court rejected the argument that "a formal claim of executive privilege based on the generalized interest of presidential confidentiality, without more, works an absolute bar to discovery of presidential conversations in civil litigation, regardless of the relevancy or necessity of the information sought." *Id.* at 245-6. *See also Dellums v. Powell*, 642 F.2d 1351, 1354 (D.C. Cir. 1980) (*Dellums II*); *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1980)("The privilege is qualified, not absolute, and can be overcome by an adequate showing of need.").

Petitioners' arguments that any infringement, no matter how minor, upon the President's constitutional powers or upon executive privilege is an unconstitutional violation of the principle of separation of powers are unfounded. To focus on separation of powers alone is to miss half of the equation, for there is also a concern with the principle of checks and balances. *Nixon I*, 418 U.S. at 703-4. Because both the values of executive autonomy and oversight by the other branches are implicated in this case, a balancing test between those conflicting interests is appropriate.

2. The executive interest in receiving confidential advice is only minimally infringed by the application of FACA to the NEPDG.

FACA as applied to the NEPDG is not an unconstitutional infringement upon the power granted to the President by the Recommendation and Opinion Clauses of the United States Constitution. Under the Recommendation Clause, the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. Under the Opinion Clause "he may require the Opinion, in writing, of the principal Officer in each of the executive Departments." U.S. Const. Art. II, § 2, Cl. 1.

The ability to recommend legislation to Congress is not an exclusive power granted to the President. Anyone in the country may propose legislation. *Association of American Physicians v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993) ("*AAPS*"). The D.C. Circuit noted in *AAPS* that according to the notes of James Madison, the "shall" language of Article II was included only to make clear that the President *could* recommend legislation and to prevent "umbrage or cavil" on the part of Congress when he did. *Id.* at 908, n.8. The power to recommend legislation is not comparable to the "need to protect military, diplomatic, or sensitive national security interests" cited by the Court in *Nixon I*, and not of such overwhelming importance that it may not be weighed against other interests.

FACA does not prevent the President from recommending legislation to Congress, thus, on its face, FACA does not directly interfere with the Recommendation Clause. To the

extent that FACA does interfere with the President's recommendation powers, it is a slight and indirect interference. Petitioners assert that FACA interferes with the President's ability to receive candid advice, which in turn harms the quality of the legislation the President recommends to Congress. This interference therefore only indirectly affects the President's Article II power.

Additionally, FACA's indirect influence only implicates a small, narrowly circumscribed category of advice to the President. FACA does not affect individual communications the President has with government advisors or with members of the public, nor does it affect advisory committees established by the President that consist solely of government officers or employees. 5 U.S.C. App. 1 § 3(2). FACA's openness provisions only apply to Presidential advisory committees that include members of the public. Consistent with FACA, the President is fully free to receive candid and confidential advice from individual government officials and members of the public, and from advisory committees composed entirely of government employees. *National Anti-Hunger Coalition v. Executive Committee*, 711 F.2d 1071, 1073 n.3 (D.C. Cir. 1983).

Because FACA does not interfere with the President's ability to receive the individual written opinion of the heads of the executive departments, the Opinion Clause is not implicated.

Furthermore, what is at stake in this case is not necessarily direct advice to the President, but advice to lower-level executive officers. To the extent that any sub-groups of the NEPDG may have included non-governmental employees, their input would have been to the lower-level executive members of the NEPDG. "Extending presidential privilege to

the communications of presidential advisers not directly involving the President inevitably creates the risk that a broad array of materials in many areas of the executive branch will become sequestered from public view." *In re Sealed Case*, 121 F.3d at 749 (internal quotation omitted).

The minimal interference with Article II powers in this case is not comparable to the legislative interference with presidential appointments in *Public Citizen v. United States Department of Justice*, 491 U.S. 400 (1989), relied on repeatedly by the petitioners. The majority in *Public Citizen* did not even reach the question of the constitutionality of applying FACA to the President's use of the American Bar Association to recommend judicial nominees, ruling entirely on statutory grounds. *Id.* at 443. Only the concurrence reached that question, and its concerns are distinguishable from those in this case. *Id.* at 467-8

According to the *Public Citizen* concurrence, the application of FACA to the President's use of the ABA to recommend judicial nominees was unconstitutional because it conflicted with the President's appointment power under Article II. *Id.* at 487. "He shall have power ... and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court, and all other Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. As the concurrence in *Public Citizen* recognized, the power to appoint judges belongs exclusively to the President, and the role of Congress is clearly delineated. 491 U.S. at 483-5. It was upon this basis that the *Public Citizen* concurrence rejected the balancing approach of *Nixon* and *Morrison* to the President's appointment power. *Id.* Referring to *Nixon II* and *Morrison* the concurrence wrote, "In each of these cases, the power at issue was not explicitly assigned by the text of the Constitution to

be within the *sole province* of the President." *Id.* (emphasis added).

As discussed above, the power to recommend legislation is not exclusive to the President, and Congress' role is not so clearly circumscribed as with the appointment power. Much as *Morrison* was "not a case in which the power to remove an executive official has been completely stripped from the President," 487 U.S. at 692, in this case the President's ability to obtain the opinion of executive officers and recommend legislation has only been slightly and indirectly affected.

3. Complete immunity from discovery is unnecessary because there are other means of protecting the executive interest.

Blanket refusal to respond to discovery in this case is both unnecessary and inappropriate. A number of other protections exist to protect the confidentiality of executive communications, including the invocation of executive privilege and all of the normal protections that exist in civil discovery to protect litigants from abuses of discovery.

The proper remedy when the executive believes that a discovery order will damage confidential communications is to invoke a claim of executive privilege. "If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly ... invoke a claim of privilege on the return of the subpoena." *Nixon I*, 418 U.S. at 713. *See also Nixon II* 433 U.S. at 443. Once executive privilege has been invoked, it then becomes the duty of the opposing party to demonstrate that the privileged material is essential to the just disposition of the case. *Id. See also In re Sealed Case*, 121 F.3d at 744-5.

Even where executive privilege has been overcome by the need for relevant evidence in a case, protections still exist to maintain the confidentiality of executive communications when necessary and appropriate. Allowing discovery to proceed is not, as petitioners assert, the same as mandating that records be open as required by FACA. Brief of petitioners at 48. "Disclosure because of the potential needs of litigation need not be made to the public." *Dellums I*, 561 F.2d at 249.

In camera review, as provided for by Fed. R. Civ. Pro. 26(c), is the proper protection in these circumstances. *Nixon I*, 418 U.S. at 713-4. "If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material." *In re Sealed Case*, 121 F.3d at 745. *See also Dellums I*, 561 F.2d at 251.

Other protections include limiting the scope of discovery and sealing necessary portions of the record upon a showing of good cause. Fed. R. Civ. Pro. 26(b)(2); Fed. R. Civ. Pro. 26(c). Finally, where claims or discovery requests in a case are improper or unwarranted, sanctions are available. Fed. R. Civ. Pro. 11(c); Fed. R. Civ. Pro. 26(g).

Because of the existence of these other protections, the petitioners' requested immunity from discovery is unnecessary and an inappropriate expansion of executive power. The problem in this case is not that appropriate protections for executive communications do not exist, but that the petitioners either failed, or refused, to ask for them. *In re Cheney*, 334 F.3d 1096, 1104-6 (D.C. Cir. 2003).

B. The public and the news media have an important interest in the application of FACA to NEPDG meetings.

In a democracy the public has an undoubted interest in access to the workings of the government that acts in the public's name and with public funds. According to James Madison, "popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *In re Sealed Case*, 121 F.3d at 749 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822)).

The news media fill a vital role in providing that knowledge to the public. For many people, media access in the form of press reports, trade journals, and television and radio broadcasts is their only conduit for information about the workings of government in general, and advisory committees in particular. *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048, 1052 (D.D.C. 1974). The news media have a "statutory right under [FACA] as well as a First Amendment privilege to report on the manner in which Government affairs are conducted." *Id.*

To that end, Congress enacted the Federal Advisory Committee Act, mandating that the records and meetings of certain advisory committees be open to the public that they serve. "[T]he Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees." 5 U.S.C. App. 1 § 2(b)(5). "Congress was concerned with the proliferation of unknown and sometimes secret 'interest groups' or 'tools' employed to promote or endorse agency policies." *Gates v.*

Schlesinger, 366 F. Supp. 797, 799 (D.D.C. 1973). "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Public Citizen*, 491 U.S. at 453.

There is a further interest in access to advisory committees because of the legitimacy bestowed upon legislation when it was recommended by a group that conferred and considered the issue. "The group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally. Advisory committees not only provide ideas to the government, they also often bestow political legitimacy on that advice." *AAPS*, 997 F.2d at 913. Members of the public therefore have an interest in knowing who was on the committee, so that they might know if the resulting legislation and advice is truly the product of learned consideration, or if one viewpoint or another was given undue weight and consideration. This group-bestowed legitimacy differentiates the interest in access to an advisory committee under FACA from the interest in executive communications with individual members of the public or individual government officials.

The national energy policy discussed and recommended by the NEPDG is a matter of great public interest and importance. *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F. Supp.2d 20, 25 (D.D.C. 2002). The NEPDG was charged by President Bush with "develop[ing] ... a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." *In re Cheney*, 334 F.3d at 1098 (quoting Mem. Establishing National Energy Policy Development Group, Jan. 29, 2001). The NEPDG was thus charged

with balancing the oft-conflicting interests of business and environment, and of crafting a nationwide energy policy that would sustain the entire country into the future.

The public interest intensified with allegations that Kenneth Lay, the former CEO of the bankrupt energy company Enron, had contacts with the NEPDG. *Judicial Watch*, 219 F. Supp.2d at 25. Allegations that members of the energy industry may have had influence, improper or otherwise, on the recommendations of the NEPDG call into question the legitimacy bestowed by the group. This is amplified by the fact that national energy policy concerns matters of scientific and technical knowledge that the lay public must rely upon the NEPDG to evaluate for it.

The public's interest in the workings of the NEPDG is therefore very great, both so that the public may be properly informed about the recommended energy policy, and so that it may be assured that the policy is not the subject of undue influence from any particular interest. Thus the news media's interest is also great as they provide the public its primary means of access to this information.

II. The administrative record is not an adequate basis upon which to decide this case.

The administrative record is just a reiteration of the petitioners' disputed claims, and thus it is not an adequate basis upon which to decide this case. Petitioners argue that in order to avoid their asserted constitutional objections to the application of FACA to the NEPDG, the Court should instead decide this case on the basis of the administrative record and the Declaration of Karen Y. Knutson, Deputy Director of the NEPDG. Brief of petitioners at 8, 11-12. To decide the case

on this basis is to decide the case on nothing more than the petitioners' untested assertions that the NEPDG did not violate FACA.

Because FACA provides no private cause of action, this case is before the Court under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*(APA), and a petition for *writ of mandamus* under the All Writs Act, 28 U.S.C. § 1361. *In re Cheney*, 334 F.3d at 1099.

Normally cases brought under the APA should be decided on the basis of the administrative record alone. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). However there is an exception to this rule "where there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents affective judicial review." *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). *See also Overton Park*, 401 U.S. at 420; *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990).

The administrative record in this case is less than bare. The ultimate question before the District Court is whether non-governmental individuals were members of the NEPDG or participated regularly in its meetings, thus implicating FACA's openness requirements. But the dispute extends to what the appropriate definitions of "meeting" and "member" are under the Act. *See* Defendants' Responses to Plaintiffs' First Set of Interrogatories and Requests for Production, J.A. at 233. When the very definitions of what constitutes a "meeting" and who is a "member" are disputed, petitioners' declarations of who were and were not members are merely reiterations of their side of the argument and do not answer the questions. Deciding the case on the basis of the administrative record is to simply allow the petitioners to make an

unsupported claim that they did not break the law, without ever allowing a court to examine the validity of that claim.

Reliance on the Declaration of Karen Y. Knutson is also insufficient as such affidavits may be "merely 'post-hoc' rationalizations which have traditionally been found to be an inadequate basis for review." *Overton Park*, 401 U.S. at 419 (internal citation omitted). *See also Commercial Drapery*, 133 F.3d at 7. Furthermore, with regard to the staff-level sub-groups, Ms. Knutson could not recall how many meetings occurred or precisely who attended, and could only assert "[t]o the best of my knowledge" that only full-time federal employees attended. *See* Declaration of Karen Y. Knutson, J.A. at 240-1.

The case involving former President Clinton's health care task force provides an example of why such reliance on the administrative record and an affidavit is insufficient. In that litigation, Ira Magaziner, Senior Advisor to the President for Policy Development, signed a declaration under penalty of perjury stating that only government employees served as "members" of the working group of the President's Task Force on National Health Care Reform. *Association of American Physicians v. Clinton*, 879 F. Supp. 106, 107 (D.D.C. 1994). As in this case, the definition of "members" was in question. *Id.* Once the litigation proceeded, it was discovered that "numerous individuals who were never federal employees did much more than just attend working group meetings on an intermittent basis" and that "some of these individuals even had supervisory or decision-making roles." *Id.* at 108. *See also National Anti-Hunger Coalition*, 711 F.2d at 1074-77 (Cir. Ct. was unable to review new evidence of the activities of an advisory body where the new evidence was not in the record before the District Court).

Finally, remanding this case to the District Court will allow the courts to refine – based on a fact-specific record – how questions of what constitute "meetings" and "members" under FACA that have been at issue since *AAPS* and before are to be answered. 997 F.2d at 914. This is precisely what both the District Court and Court of Appeals attempted to do in this case. *Judicial Watch*, 219 F. Supp.2d at 53-4; *In re Cheney*, 334 F.3d at 1108-9. As the Court said in *Nixon II* in reference to the Presidential Recordings and Materials Preservation Act, "If the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to consider that problem in a specific factual context." 433 U.S. at 455.

CONCLUSION

Amici respectfully ask the Court to weigh the minimal infringement the Federal Advisory Committee Act makes upon confidential executive communications against the Act's vital importance to the news media and the public. In so doing, the Court should find in favor of the respondents by affirming the decisions of the lower courts, and remand this case to the District Court to proceed with discovery and resolution of the constitutional issues.

Respectfully submitted,

LUCY A. DALGLISH, ESQ.
Counsel of Record
GRANT D. PENROD, ESQ.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1815 N. Fort Myer Drive, Suite 900
Arlington, VA 22209
(703) 807-2100

March 11, 2004

Of Counsel:

RICHARD M. SCHMIDT, JR., ESQ.
KEVIN M. GOLDBERG, ESQ.
COHN AND MARKS LLP
1920 North Street, NW, Suite 300
Washington, DC 20036
Counsel for American Society of Newspaper Editors

BRUCE W. SANFORD, ESQ.
ROBERT D. LYSTAD, ESQ.
BRUCE D. BROWN, ESQ.
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW, Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

(12)

MAR 11 2004

No. 03-475

IN THE

Supreme Court of the United States

RICHARD B. CHENEY,
Vice President of the United States, *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF RESPONDENTS

SHARON BUCCINO
NATURAL RESOURCES
DEFENSE COUNCIL
Suite 400
1200 New York Ave., N.W.
Washington, D.C. 20005

ERIC R. GLITZENSTEIN
Counsel of Record
HOWARD M. CRYSTAL
MEYER & GLITZENSTEIN
Suite 700
1601 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 588-5206

Attorneys for Amicus Curiae

186196

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PETITIONERS HAVE PRESENTED A SERIOUSLY DISTORTED VIEW OF FACA'S REQUIREMENTS 4

II. LIMITED DISCOVERY HAS FREQUENTLY BEEN AUTHORIZED BY COURTS IN RESOLVING FACA CASES, AND SUCH DISCOVERY IS ESPECIALLY IMPORTANT IN THIS CASE. 8

A. The Discovery Authorized Here Is Not "Tantamount To Relief" For A Violation of FACA. 8

B. Courts Have Frequently Authorized Discovery In FACA Cases, Rather Than Simply Defer to the Executive Branch's Position As To Which Entities Are Subject To The Statute. 16

III. PETITIONERS' ARGUMENT THAT FACA CANNOT BE APPLIED TO THE NEPDG WITHOUT VIOLATING THE SEPARATION OF POWERS IS PREMATURE, AND BASED ON A MISREADING OF THIS COURT'S PRECEDENTS 27

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Animal Legal Defense Fund v. Shalala,
104 F.3d 424 (D.C. Cir. 1997) 9-10

Association of American Physicians and Surgeons v. Clinton,
997 F.2d 898 (D.C. Cir. 1993) ..... *passim*

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 18

Clinton v. Jones,
520 U.S. 681 (1997) 3, 15, 17

Common Cause v. NRC,
674 F.2d 921 (D.C. Cir. 1982) 29

Conley v. Gibson,
355 U.S. 41 (1957) 19

Cummock v. Gore,
180 F.3d 282 (D.C. Cir. 1999) 18

Food Chemical News v. Young,
900 F.2d 328 (D.C. Cir. 1990) 26

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 16

Morrison v. Olson,
487 U.S. 654 (1988) 29

Cited Authorities

Page

NRDC v. Abraham,
223 F. Supp. 2d 162 (D.D.C. 2002) 18

NRDC v. Curtis,
189 F.R.D. 4 (D.D.C. 1999) 18

NRDC v. Department of Energy,
191 F. Supp. 2d 41 (D.D.C. 2002) 2

NRDC v. Department of Energy,
353 F.3d 40 (D.C. Cir. 2004) 1

NRDC v. Pena,
147 F.3d 1012 (D.C. Cir. 1998) 1, 18

Nader v. Baroody,
396 F. Supp. 1231 (D.D.C. 1975) 21

National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control,
557 F. Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983) 7

National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control,
566 F. Supp. 1515 (D.D.C. 1983) 23

Nixon v. General Services Administration,
433 U.S. 425 (1977) 4, 28, 29, 30

Public Citizen v. Department of Justice,
491 U.S. 440 (1989) 24-25, 26

Cited Authorities

Page

Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989) 5

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 19

Washington Legal Foundation v. United States Department of Justice, 691 F. Supp. 483 (D.D.C. 1988) 26

Washington Legal Foundation v. United States Sentencing Commission, 17 F.3d 1446 (D.C. Cir. 1994) 26

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 17

Constitution, statutes and regulations:

U.S. Const., Art. II, § 2 ..... *passim*

U.S. Const., Art. II, § 3 28

Federal Advisory Committee Act, 5 U.S.C. App. 2 .. *passim*

5 U.S.C. App. 2 § 2(a) 5

5 U.S.C. App. 2 § 2(b)(4) 5

5 U.S.C. App. 2 § 3(2) 3, 11, 22

5 U.S.C. App. 2 § 5(b) 7, 25

Cited Authorities

Page

5 U.S.C. App. 2 § 5(c) 7, 25

5 U.S.C. App. 2 § 9(a) 22, 23

5 U.S.C. App. 2 § 10(a)(2) 6

5 U.S.C. App. 2 § 10(b) 3, 9, 10

5 U.S.C. App. 2 § 10(c) 6

Freedom of Information Act, 5 U.S.C. § 552 ..... *passim*

5 U.S.C. § 552(b) 6

Presidential Records Act of 1978, 44 U.S.C. § 2201 6

Sunshine Act, 5 U.S.C. § 552b 6

5 U.S.C. § 552b(c) 6

Executive Order 11,686 (1972) 6

Executive Order 13,212 (2001) 30

Legislative History:

Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. (Comm. Print 1978) 5

H. Rep. No. 1017, 92d Cong., 2d Sess. (1972) 5, 24, 25, 30

118 Cong. Rec. 30,276 (1972) 5

INTEREST OF THE AMICUS CURIAE[1]

The Natural Resources Defense Council ("NRDC") is a non-profit organization with over 400,000 members dedicated to the protection of the environment. NRDC engages in extensive advocacy and public education with regard to the development of environmentally sound energy policies. NRDC – which filed an extensive *amicus* brief and participated in oral argument in the district court, *see* Pet. App. 60a-61a; *see also id.* at 74a, 117a (relying on arguments advanced by NRDC in denying motion to dismiss) – has two significant, interrelated interests in this case.

First, NRDC has an institutional interest in the proper implementation and interpretation of the Federal Advisory Committee Act, 5 U.S.C. App. 2 ("FACA"). The federal government regularly relies on advisory committees for a host of environmental, scientific, and public health-related issues that are of central concern to NRDC and its members, and thus the organization has a substantial interest in ensuring that the federal government properly carries out its responsibilities under the statute. As an outgrowth of that interest NRDC has engaged in extensive litigation under FACA. *See, e.g., NRDC v. Dep't of Energy*, 353 F.3d 40 (D.C. Cir. 2004); *NRDC v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998).

Second, NRDC has a significant organizational interest in obtaining the kind of information sought by the respondents in this case – *i.e.*, details concerning the National Energy Policy Development Group ("NEPDG"), and how the recommendations of the NEPDG and its subgroups were developed. As a result of litigation brought by NRDC against the Department of Energy ("DOE") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), DOE was ordered

---

1. None of the attorneys for the parties in this case authored any of this *amicus* brief, and no one other than NRDC made any monetary contribution to the preparation or submission of this brief. *Amicus* has received the written consent of the parties to file this brief, and these consents are being lodged with this brief.

to release records that provided the public with some understanding of the workings of the NEPDG, although DOE continues to withhold most of these documents from public scrutiny. *See NRDC v. Dep't of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002); *see also* Brief for the Petitioners ("Pet. Br.") at 6. The sweeping separation of powers arguments advanced by the government in this case may also have a direct bearing on the public's rights of access under FOIA, including NRDC's pending FOIA case against DOE.[2]

SUMMARY OF ARGUMENT

I. On separation of powers grounds, petitioners are asserting a blanket "immunity," Pet. Br. at 42, from "*any* discovery against the Vice President and immediate assistants to the President," regardless of the sensitivity or confidentiality of the particular information sought, or its importance to plaintiffs' FACA claims. *Id.* at 47 (emphasis in original). This Court has never previously sustained such a sweeping assertion of executive power and "immunity" from judicial process – and for good reason. If accepted, this approach would actually erode, rather than safeguard, the separation of powers by drastically curtailing the role of the federal courts in enforcing statutes passed by Congress.

a. Petitioners' argument that the lower courts could not have allowed *any* discovery to proceed against the Executive Branch officials and employees most knowledgeable about the workings of the NEPDG and its subgroups is based on the oft-repeated premise that the lower courts authorized "discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself." Pet. Br. at 9. This unsupported assumption, however, has no basis in legal reality, since there is no necessary or even logical relationship between FACA's "disclosure requirements" and the discovery actually authorized by the lower courts.

2. NRDC agrees with the jurisdictional arguments that have been raised by respondents. If, however, the Court addresses the merits, this brief focuses on certain points that are pertinent to any such consideration.

While FACA requires that non-exempt "records, reports, transcripts, minutes," and other documents "prepared for or by each advisory commitee shall be available for public inspection," 5 U.S.C. App. 2 § 10(b), the Court of Appeals has made clear that, to pursue their FACA claims, respondents "must discover *only whether non-federal officials participated* and, if so, to what extent." Pet. App. 17a (emphasis added). Petitioners never explain how such "narrow, carefully focused discovery," Pet. App. 19a, would violate the separation of powers, especially since the lower courts have stressed that petitioners may object, on privilege or other grounds, to the disclosure of any particular information. *See* J.A. 258, 288.

Most conspicuously, petitioners simply ignore respondents' claims that subgroups of the NEPDG were subject to FACA, even if the NEPDG itself was not. *See* 5 U.S.C. App. 2 § 3(2). Petitioners suggest no legitimate reason why respondents should be precluded from discovering information bearing on the structure and composition of subgroups – information that is not reflected at all in petitioners' scant "administrative record." Pet. Br. at 26. Indeed, since, as this Court has held, even "sitting Presidents" may be subject to "to court orders to provide testimony" in civil cases, *Clinton v. Jones*, 520 U.S. 681, 704 (1997), it is difficult to fathom how the Constitution could be violated through discovery focused on whether and how *non*-federal employees participated in the work of the NEPDG or its subgroups.

b. Petitioners' contention that the lower courts should have simply deferred to the government's representation that the NEPDG and its subgroups functioned in a manner that exempted them from FACA, Pet. Br. at 9, also conflicts with basic principles of judicial review of Executive Branch action, particularly how such review has been conducted in FACA cases since that statute's enactment. As in this case, courts construing FACA have frequently authorized narrow discovery aimed at ascertaining whether particular Executive Branch committees were subject to FACA, and whether specific provisions of the Act were violated. Such factfinding has helped courts *avoid* unnecessary constitutional adjudication.

II. Petitioners' contention that FACA could not constitutionally be applied to the NEPDG or its subgroups under any circumstances because this would necessarily "interfere with core Executive Branch functions," Pet. Br. at 28, is, in practical effect, an argument that FACA is unconstitutional on its face, since virtually every advisory committee could be said to implicate the Opinion Clause, Recommendations Clause, or some other constitutional authority vested in the Executive Branch. Petitioners offer no justification for the Court to even address this unprecedented position – which, if adopted, would also call into question the validity of the FOIA and other open government laws – before the lower courts have even determined, based on a factual record, whether FACA applies to the NEPDG or subgroups. In any event, contrary to petitioners' argument, this Court has employed a pragmatic balancing test in considering the constitutionality of statutes such as FACA, *see, e.g., Nixon v. General Services Administration*, 433 U.S. 425 (1977), and the application of that test would also benefit from limited discovery, as the lower courts found.

ARGUMENT

I. PETITIONERS HAVE PRESENTED A SERIOUSLY DISTORTED VIEW OF FACA'S REQUIREMENTS.

Before turning to petitioners' specific arguments, it is important to summarize the reasons why Congress enacted FACA and the modest procedural requirements imposed by the statute. This summary is especially useful because petitioners' brief proceeds on the erroneous assumption that FACA's application to the NEPDG would necessarily result in "extreme interference" with the President's ability to obtain policy advice or make decisions. Pet. Br. at 35. In fact, however, Congress did not enact FACA to "interfere" with, or foreclose, the Executive Branch's use of advisory committees but, rather, simply to ensure that such committees would operate in the public interest.

After holding extensive hearings in 1970 and 1971 on the

substantial control over them," Congress concluded that it was essential to establish a comprehensive system for regulating this influential "fifth arm of the government." Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts, and Other Documents*, 95th Cong., 2d Sess. 293 (Comm. Print 1978) (remarks of Rep. Monagan) ("FACA Source Book"). Of particular pertinence here, Congress found that:

> *[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns.* Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests.

H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972) (emphasis added), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3491, 3496; *see also* 118 Cong. Rec. 30,276 (1972) (Senate staff report submitted by Senator Percy) ("'Viewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change and preserve a federal policy for their own ends.'") (quoted in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419, 425 (D.C. Cir. 1989) (Friedman, J., concurring in the judgment)).

To address these overriding national interests, when FACA was enacted in 1972, Congress recognized that, while advisory committees are "frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government . . . [,] standards and uniform procedures should govern the[ir] establishment, operation, administration and duration. . . ." 5 U.S.C. App. 2 §§ 2(a), (b)(4). FACA was

endorsed the statute's "standards for the establishment, operation, termination, and control of advisory committees," but also directed that the "heads of all executive departments and agencies shall take appropriate action to assure their ability to comply with the provisions of the Act." Executive Order 11,686 (1972), *reprinted in* FACA Source Book at 340.

Consistent with the Congressional purposes underlying the statute, FACA does not regulate the subject matter that advisory committees may consider, nor does it in any way dictate the results of their deliberations. Instead, the Act simply establishes uniform rules governing the procedures and operations of such committees, and seeks to ensure that they meet basic standards of public accountability. Many of these standards parallel provisions found in other open government statutes, such as FOIA, 5 U.S.C. § 552, the Sunshine Act, 5 U.S.C. § 552b, and the Presidential Records Act of 1978, 44 U.S.C. § 2201. As is true with these statutory schemes, the day-to-day implementation of FACA is assigned to Executive Branch officials.

FACA provides that agencies must generally provide the public with "timely notice" of committee meetings. 5 U.S.C. App. 2 § 10(a)(2). However, a committee meeting may be closed to the public in whole or in part if the agency determines that matters to be discussed at the meeting fall within one of the ten exemptions to the Sunshine Act. *Id.* at § 10(d); *see also* 5 U.S.C. § 552b(c). Those exemptions apply, *e.g.*, to matters that must be "kept secret in the interests of national defense or foreign policy," "trade secrets and commercial or financial information," materials "compiled for law enforcement purposes," and matters that would be "likely to significantly frustrate implementation of a proposed agency action." *Id.* Under section 10 of FACA, the committee must keep minutes of each meeting, *see* 5 U.S.C. App. 2 § 10(c), and make the records -- along with any reports, records, or other documents used or generated by the committee -- available to the public, provided that they do not fall within the exemptions to disclosure contained in the FOIA, which also cover such matters as national security, law enforcement, and trade secret material. *Id.* at § 10(b); *see also* 5 U.S.C. § 552(b).

Under section 5 of FACA, an advisory committee must be "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. App. 2 §§ 5(b), (c). However, courts have determined that the government has very wide latitude in meeting this requirement by defining the functions of their committees, as well as the type of representation that is relevant to the performance of those functions. *See National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

Since 1972, thousands of advisory committees have been chartered in accordance with FACA and have complied with the Act's various requirements, while still furnishing advice and recommendations to the President and federal agencies. According to a website maintained by the General Services Administration, there are presently 947 "active" advisory committees that are complying with the statute's provisions, including 43 "presidential" advisory committees that have been chartered under FACA. *See http://www.fido.gov/facadatabase*. Examples of such "presidential" committees that *are* complying with FACA include the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, the Presidential Advisory Council on HIV/AIDS, and the President's Commission to Strengthen Social Security. *Id.*

Plainly, if thousands of committees, including dozens of Presidential bodies – many dealing with highly sensitive and controversial issues – have managed to comply with FACA, then it is not the case that compliance with the statute necessarily "interferes" with the President's ability to obtain advice from such bodies. In any event, the lower courts here have not even had the opportunity to determine *whether* the NEPDG or its subgroups are the types of entities that should be subject to the statute. As we discuss next, petitioners' arguments as to why the courts should be precluded from even making that

determination in light of an appropriate factual record are also based on a fundamental misunderstanding of FACA and how the statute has been enforced by the courts.

II. LIMITED DISCOVERY HAS FREQUENTLY BEEN AUTHORIZED BY COURTS IN RESOLVING FACA CASES, AND SUCH DISCOVERY IS ESPECIALLY IMPORTANT IN THIS CASE.

A. The Discovery Authorized Here Is Not "Tantamount To Relief" For A Violation of FACA.

Petitioners' central justification for why this Court should take the extraordinary step of addressing their sweeping separation of powers arguments *before* the lower courts have even had the opportunity to rule on whether FACA applies here is that the discovery sought by plaintiffs "raises the *same constitutional concerns* as would a final judicial determination that FACA applies." Pet. Br. at 18 (emphasis added); *id.* at 11 ("The discovery that has been ordered raises the same separation-of-powers problems as the statutorily mandated disclosures that would follow from a final determination that FACA applied to the NEPDG."). This contention, in turn, is based on the repeated premise that the district court and D.C. Circuit authorized "wide-ranging discovery" that would be "*tantamount to relief for a proven FACA violation*." Pet. Br. at 9, 47 (emphasis added); *see also id.* at 20-21 ("discovery obligations may, as in this case, be at least as intrusive as the disclosure obligations imposed by FACA itself"); *id.* at 39 ("The outcome of the lawsuits will largely be beside the point, as the remedy for a proven FACA violation is not materially different from a discovery order.").

Of course, since petitioners did not, before appealing, even allow the district court to decide *what* specific discovery would be allowed, and which of petitioners' "legitimate objections" (J.A. 208) to discovery would be sustained, petitioners' asserted concerns with "wide-ranging discovery" are, at minimum, facially premature, and have no basis in any actual ruling made by the district court or court of appeals. *See, e.g.*, J.A. 208 (statement by district court that "*I recognize that there may be*

legitimate objections to the [discovery] plan that raise constitutional concerns and that raise concerns of executive privilege. If so, we'll address those objections and concerns at the appropriate time.") (emphasis added); J.A. 405 (statement by district court that "[c]ompliance with this Court's Orders will not necessarily result in plaintiffs' 'obtaining' *any* discovery, as it is entirely conceivable that defendants could assert specific viable claims of privilege for every responsive document") (emphasis in original); Pet. App. 22a (statement by court of appeals that the "narrow discovery we expect the district court to allow may avoid the need for petitioners even to invoke the [executive] privilege").

In any event, the central supposition of petitioners' brief that the lower courts have already authorized discovery that is "tantamount to relief for a proven FACA violation," Pet. Br. at 47, is unsupported in petitioners' brief, and is simply wrong. In reality, there is no necessary, or even logical, relationship between, on the one hand, what plaintiffs should be entitled to seek in discovery in order to explore the presence of a FACA violation, and, on the other hand, the relief to which plaintiffs may be entitled in the event that the district court and court of appeals were to ultimately rule that such a violation existed. To the contrary, it is clear that the "tightly-reined discovery" authorized by the lower courts, Pet. App. 118a, is much narrower, and very different in kind, from FACA's actual disclosure requirements.

Under FACA, subject to any applicable FOIA exemption, all of the "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying. . . ." 5 U.S.C. App. 2 § 10(b). Consequently, *if* the lower courts were to find that the NEPDG or its subgroups were subject to FACA, they *could* order, as relief for that violation, that non-exempt materials be made available to respondents and other members of the public. *See, e.g., Animal Legal Defense Fund v.*

Shalala, 104 F.3d 424, 431 (D.C. Cir. 1997) ("remand[ing] so that the district court may determine whether there are documents to which the appellants may obtain access" under section 10).

In contrast, to explore their claims that the NEPDG or its subgroups were subject to FACA because they in fact contained non-federal members, respondents are not entitled, nor were they the beneficiaries of any discovery order authorizing them, to receive all of the "records, reports, transcripts, minutes," and other materials subject to public disclosure under section 10(b) of FACA. Rather, as made clear by the court of appeals, the nature of the dispute between the parties narrowly circumscribes the kind of discovery respondents need to pursue their claims – *i.e.*, they "must discover *only whether non-federal officials participated, and if so, to what extent.*" Pet. App. 17a (emphasis added); *id.* at 18a (respondents "need only documents referring to the involvement of non-federal officials," and do not need to pursue broader document production requests).

Hence, not only is petitioners' assertion that the appropriate discovery here is "tantamount" to the relief for a FACA violation baseless and unsupported, but the "narrow, carefully focused discovery" authorized by the lower courts (Pet. App. 19a) can easily be pursued without in any way disclosing the core matters over which petitioners profess concern. Petitioners maintain that they are centrally concerned with "the process by which a President obtains information and *advice from the Vice President, heads of departments and agencies, and assistants to the President* in the exercise of powers committed exclusively to the President by the Constitution. . . ." Pet. Br. at 12 (emphasis added).

Critically, however, to pursue their claims here, respondents do not need – and, under the court of appeals' ruling, will not be permitted – to obtain discovery reflecting "information and advice from the Vice President, heads of departments and agencies, and assistants to the President." Indeed, such information regarding the advisory role played by *government*

officials would not seem to help respondents "establish whether *non*-federal officials participated, and if so, to what extent." Pet. App. 17a (emphasis added).

Conspicuously, while repeatedly raising the specter of "broad" discovery into the inner workings of the Executive Branch (which no court has ever authorized in this case), petitioners never explain why they would suffer *any* demonstrable harm from the specific discovery that is actually pertinent to plaintiffs' claims – let alone why they need wholesale "immunity" from such discovery. Pet. Br. at 42. For example, respondents completely ignore a critical feature of respondents' claims that is at least partially borne out by the existing record – *i.e.*, that there are one or more "subgroups" of the NEPDG that should be complying with FACA because they have non-federal members, even if the NEPDG itself did not have to adhere to the Act. *See, e.g.*, J.A. 146 (allegation in Sierra Club complaint that petitioners formed "Sub-Groups" that "were not composed wholly of full-time officers or employees of the federal government" but, rather, included "[e]nergy industry executives, including multiple representatives of single energy companies, and other non-federal employees").[3]

FACA expressly defines an "advisory committee" as encompassing "any subcomittee or other subgroup" which is "established or utilized by the President" or by an agency in "obtaining advice or recommendations." 5 U.S.C. App. 2 § 3(2). Accordingly, if a subgroup of the NEPDG was established or utilized which contained non-federal members, then that entity would be subject to FACA even if, as petitioners insist, the NEPDG itself was only comprised of federal employees. Indeed, as explained in *Ass'n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*") – which

3. The allegation that energy industry representatives participated in the drafting of the NEPDG recommendations has been supported by some of the information that has already been disclosed. *See, e.g.*, Don Van Natta, "Executive Order Followed Energy Industry Recommendation, Documents Show," New York Times, April 4, 2002, at A14 (exhibit to district court *amicus* brief).

addressed whether President Clinton's Task Force on National Health Care Reform or its "working group" were subject to FACA – if a committee of advisors is *not* subject to FACA, and hence will avoid public scrutiny under the statute, it is especially critical to evaluate whether subgroups are improperly circumventing the Act. *See id.* at 913 ("when the Task Force itself is considered part of the government – due to the government officials exemption – we must consider more closely FACA's relevance to the working group. For it is the working group now that is the point of contact between the public and the government.").[4]

There is nothing in petitioners' meager "administrative record" – *i.e.*, the January 29, 2001 Presidential memorandum establishing the NEPDG – that discusses the structure or composition of any subgroups or subcommittees employed by the NEPDG, other than a delegation of authority to the Vice

4. While repeatedly critiquing the "*de facto* member doctrine" discussed in *AAPS*, Pet. Br. at 18, petitioners never fully explain the context in which the "doctrine" was applied in that case – which, contrary to petitioners' suggestion, *id.* at 17-18, is directly analogous to the situation here. In *AAPS*, the D.C. Circuit concluded that the Clinton Task Force was *not* subject to FACA due to First Lady Hillary Clinton's membership on the Task Force, because the "phrase 'full-time officer or employee of the government'" could be read to include the First Lady. 997 F.2d at 911. The Court reasoned, however, that its ruling on the exclusion of the Task Force itself necessitated closer scrutiny of the "working group" which had been set up to assist the Task Force, and which was alleged to have included non-federal members. Following a thoughtful analysis of the kinds of factors that would be pertinent to assessing whether the working group would be subject to FACA – such as whether the working group had an "organized structure, a fixed membership, and a specific purpose" and, if so, the extent of involvement by non-federal parties, *id.* at 914-15 – the Court found that "[w]e simply have insufficient material in the record to determine the character of the working group and its members." *Id.* at 915. Consequently, the Court concluded that "we believe further proceedings, including expedited discovery, are necessary before the district court can confidently decide whether the working group is a FACA committee." *Id.* at 915-16. That reasoning applies squarely to this case as well.

President to "establish subordinate working groups to assist the Energy Policy Development Group in its work." J.A. 157. Thus, petitioners' "administrative record" in no way addresses whether such "working groups" were, in fact, formed and, if so, whether they had the kind of structure and function that would subject them to FACA, *see AAPS*, 997 F.2d at 915, and whether they were composed entirely of full-time federal employees.

Consequently, petitioners found it necessary to file, in the district court, a litigation *affidavit* purporting to address those issues, among others. *See* Declaration of Karen Y. Knutson (J.A. 235-41). In that affidavit, Ms. Knutson – the Deputy Assistant to the Vice President for Domestic Policy – states that the Executive Director of the NEPDG (Andrew Lundquist, a DOE employee who was "on assignment to the Office of the Vice President," J.A. 236) had in fact established at least one "Working Group" which "held numerous meetings regarding drafting of the Report." J.A. 240. Ms. Knudson's affidavit further states that "*[t]o the best of my knowledge*, the only attendees at such meetings were full-time Federal employees of the departments, agencies, and offices whose heads constituted, with the Vice President, the NEPDG," with the "exception" of "one individual" who assisted with the "preparation of the NEPDG Report." *Id.* (emphasis added). However, Ms. Knudson also acknowledges that "*I do not recall how many meetings of the staff-level group occurred* or precisely which employees attended, nor did the Office of the Vice President to the *best of my knowledge* keep records at such meetings that reflect such information." *Id.* (emphasis added).

In short, in a litigation affidavit, petitioners have conceded that there *was* at least one subgroup assisting the NEPDG that had regular meetings, although petitioners' brief says nothing whatsoever about that entity or *its* potential FACA coverage, nor does the brief address any other subcommittees that may have been formed by petitioners or federal agencies working on the NEPDG report, despite the fact that respondents' complaints specifically seek relief with respect to any NEPDG

"sub-groups." Moreover, while resisting "*any* discovery" at all from the Office of the Vice President, Pet. Br. at 47 (emphasis in original), including information that might shed additional light on the operations and membership of the Working Group or other subgroups, petitioners have relied on factual assertions from an individual who does not even purport to have *personal* knowledge of the attendees at all Working Group meetings but, rather, has made sworn statements "to the best of [her] knowledge" – without ever even describing the factual basis for her "knowledge," or how complete it is. J.A. 241.

Petitioners have completely failed to explain how limited discovery concerning the operation and membership of the Working Group or other subgroups – including by exploring the accuracy of, and basis for, the factual assertions in Ms. Knudson's affidavit – entails a separation of powers violation. For instance, if, despite the "best of [Ms. Knudson's] knowledge," petitioners *do* have documents reflecting that the regular "attendees at such meetings" included not only employees of federal agencies, but also representatives of energy companies with financial interests in the work of the NEPDG, those records would certainly be pertinent to plaintiffs' claims that the Working Group or other subgroups constituted FACA committees, even if the NEPDG itself did not. But it is difficult to understand how the disclosure of *that* specific information would "implicate[] important separation-of-powers concerns," Pet. Br. at 42 – unless those "concerns" are so much "broader than and antecedent to any specific future claims of privilege," *id.*, that they foreclose even the most pedestrian inquiries into the activities of the Executive Branch.

By the same token, even if respondents had sought to take Ms. Knudson's deposition for the purpose of exploring the specific assertions in her *post hoc* affidavit – *e.g.*, to find out whether *she* in fact attended all of the Working Group and NEPDG meetings and, if not, how she knows who did – rather than simply submit document production requests and interrogatories, as respondents have done to date, it is equally

hard to imagine how that would "violate the[] separation of powers principles in a most direct way." Pet. Br. at 32. Indeed, especially since, as this Court explained in *Clinton v. Jones*, 520 U.S. 681 (1997), even "*sitting Presidents* have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty," *id.* at 704 (emphasis added), it seems inconceivable that simply exploring factual assertions made by a "deputy assistant" to the Vice President as to whether non-federal employees attended certain meetings *necessarily* constitutes a separation of powers violation. *Id.* at 702 ("petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions"). Once again, however, even if petitioners could articulate some legitimate reason why that, or any other specific discovery, should not take place, the lower courts have made clear that petitioners will have every opportunity to do so before disclosure of anything occurs. *See, e.g.*, J.A. 258 (statement by district court that "I'm not ordering the defendants to turn over any privileged documents whatsoever. I'm just telling them to turn over those documents that aren't privileged pursuant to the panoply of discovery rules that are in place").[5]

---

5. This example also highlights why petitioners' reference to the production of "more than 36,000 pages of documents related to the NEPDG," Pet. Br. at 6, is a red herring. The vast majority of those documents were initially disclosed by DOE and other federal agencies in FOIA litigation brought by NRDC and Judicial Watch. While those documents provide some information on the role that the agencies played in supporting the NEPDG process, they do not shed much light on the workings of the NEPDG itself or on the Working Group. In fact, in the FOIA litigation, the government has taken the position that records

(Cont'd)

B. Courts Have Frequently Authorized Discovery In FACA Cases, Rather Than Simply Defer to the Executive Branch's Position As To Which Entities Are Subject To The Statute.

Petitioners' argument that the "President and the Vice President are in the best position to know how the NEPDG's advisory activities were structured" and whether FACA was implicated, Pet. Br. at 23 – and hence the district court could not authorize even limited discovery to develop a factual record for assessing plaintiffs' claims – contravenes fundamental notions of independent judicial review, as well as abundant precedent authorizing discovery in FACA cases. As a general matter, by arguing that the lower courts cannot authorize even carefully circumscribed discovery – subject to petitioners' claims of executive, or any other, privilege – petitioners' position clearly encroaches on the judiciary's authority to determine whether the Executive Branch has obeyed the law.

Defendants' approach violates the rudimentary principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Thus, as this Court has explained:

> we have long held that when the President takes official action, *the Court has the authority to determine whether he has acted within the law.* Perhaps the most dramatic example of such a case

(Cont'd)
created or obtained by Mr. Lundquist and the other DOE employees, *see* J.A. 238 (describing the "five professionals employed by the Department of Energy who were originally assigned to the Office of the Vice President" to serve as staff for the NEPDG), are not even "agency records" subject to the FOIA. *See* Department of Energy's June 3, 2002 Reply Memorandum in Support of Motion for Summary Judgment , at 4-9, *NRDC v. DOE*, Civ. No. 01-2545 (D.D.C.). Consequently, there has been no disclosure of the core information that respondents need to pursue their claims, *i.e.*, records reflecting whether non-federal employees routinely participated in the work of the NEPDG or Working Group or other subgroups.

> is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe []. Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law.

Clinton v. Jones, 520 U.S. at 703 (emphasis added) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Accordingly, if, as this Court has made plain, in the course of allowing discovery directly against President Clinton to proceed, the federal courts have the Article III authority to determine whether the Executive Branch – including the President himself – has "acted within the law," then the courts necessarily have the requisite authority to allow the factfinding essential to *apply* the law, especially where, as here, petitioners never have coherently explained how discovery tailored to assessing whether and how *non*-federal employees participated in the work of the NEPDG would unduly impinge on Executive Branch powers.[6]

6. Indeed, while repeatedly asserting that discovery here "raises the same separation-of-powers problems" as would a final ruling that the NEPDG must comply with FACA, Pet. Br. at 11, petitioners have not explained how the specific Constitutional provisions that they have invoked are even relevant to the limited discovery authorized by the lower courts. For example, the Opinion Clause expressly applies only to the "Opinion, in writing, *of the Principal Officer in each of the executive Departments*." U.S. Const., Art. II, § 2 (emphasis added). But the written opinions of the "Principal Officer[s]" who participated on the NEPDG – *i.e.*, the Cabinet officials who served as members of the committee – far from being conveyed in confidence to the President, have not only been disclosed, but broadcast, to the public.
(Cont'd)

Petitioners' corollary contention that the lower courts should be foreclosed from authorizing "*any* discovery" against them, Pet. Br. at 47 (emphasis in original), because of the "presumption of regularity that applies to all Executive Branch actions," *id.*, at 42, conflicts with this Court's admonition that this "presumption is not to shield [Executive Branch action] from a thorough, probing, in-depth review" by the courts. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This argument also disregards extensive FACA precedent, in which courts construing and applying FACA have, consistent with the Federal Rules of Civil Procedure, often authorized discovery aimed at ascertaining whether particular Executive Branch committees and materials were subject to the law, as well as whether particular provisions of the Act were violated, without requiring that Executive Branch deliberations be disclosed. *See, e.g., AAPS*, 997 F.2d at 914 ("We simply cannot determine how to classify the working groups based on the record before us."); *Cummock v. Gore*, 180 F.3d 282, 293 (D.C. Cir. 1999) ("on remand, the District Court must engage in the necessary discovery and fact finding to determine whether any additional materials fall within the parameters to which Cummock is entitled" under FACA); *NRDC v. Pena*, 147 F.3d 1012, 1027 (D.C. Cir. 1998) (remanding for plaintiffs to take discovery against DOE that might support their request for an injunction against use of an advisory committee report prepared in violation of FACA); *NRDC v. Abraham*, 223 F. Supp. 2d 162, 187-89 (D.D.C. 2002) (relying on materials obtained by plaintiffs in discovery to find that committees established by DOE were subject to FACA); *NRDC v. Curtis*, 189 F.R.D. 4, 10 (D.D.C. 1999) ("the discovery sought relates to the general topic

(Cont'd)

See http://www.whitehouse.gov/energy (Task Force report). What is not known, but what discovery would ascertain, is whether any *non*-federal employees participated in the work of the NEPDG or subgroups in a manner that would subject them to FACA. By its plain terms, the Opinion Clause does not apply to such information.

of possible violations of FACA and evidence disclosing such violations is relevant").

In this case, as in many other FACA disputes, targeted discovery will assist the lower courts in determining whether any FACA violation has occurred – with regard to the NEPDG or the Working Group or any other subgroups – and, if so, whether relief can be crafted for that violation consistent with the separation of powers. *See* Pet. App. 19a (statement by court of appeals that "if after limited discovery, it turns out that no non-federal personnel participated as de facto NEPDG members, the district court will never have to face the serious constitutional issue lurking in this case"); Pet. App. 117a (statement by district court that "these questions are better addressed only after discovery into the activities and composition of the NEPDG and alleged Sub-Groups. Contrary to defendants' argument, it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum").[7]

On the other hand, petitioners' approach – under which the courts must simply defer to the Executive Branch's assurances regarding FACA's inapplicability, rather than allowing an independent inquiry into the pertinent facts – plainly puts the legal cart before the horse, and also runs roughshod over elementary principles of judicial review. Hence, petitioners assert

7. Petitioners complain that discovery in this case is based on an "unsupported allegation in a complaint." Pet. Br. at 9. As this Court has recently reaffirmed, however, this is how civil litigation generally works. Under Fed. R. Civ. P. 8(a)(2), a complaint "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

that the "de facto member doctrine, *particularly as applied in this case*, has no support in FACA's text," and that respondents are seeking a "standardless, amorphous" review of whether "contacts between government officials and private persons or entities might render a committee or working group an 'advisory committee.'" Pet. Br. at 18 (emphasis added).

In reality, however, neither the "de facto member doctrine," nor any other "doctrine," has even been "applied" by the lower courts in the resolution of this case on the merits. Rather, those courts have merely allowed some limited discovery to proceed – subject, once again, to petitioners' legitimate privilege claims and specific objections – so that the courts will have a factual predicate *for* determining *whether* the involvement by private parties in the work of the NEPDG or Working Group or other subgroups should subject those entities to FACA's coverage. Accordingly, it makes little sense for petitioners to complain about "standardless, amorphous" judicial review, when it is defendants' mid-litigation appeal that has prevented the lower courts from conducting review armed with a concrete factual record, and from exploring, based on such a record, what "standards" *should* be applied in situations such as this one.

For example, if, as petitioners insist, discovery confirms that particular private parties did not regularly participate in the meetings of the NEPDG or Working Group or any other subgroups, then the lower courts would, presumably, find that there was no basis for subjecting these entities to FACA, and no further judicial inquiry would be necessary or appropriate. As explained by Judge Silberman in *AAPS*:

> [w]hen an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee. In that situation, the relationship between the temporary consultant and committee is very similar to the one between the White House officials and various private sector representatives exempted from FACA in [*Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975)]. We are confident that Congress did not intend FACA to extend to episodic meetings between government officials and a consultant. To do so would achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens.

997 F.2d at 915.

If, however, discovery were to reveal, *e.g.*, that the same energy industry representatives were permitted to attend and participate in all of the meetings of the NEPDG or Working Group, then there would obviously be a strong statutory argument, in light of FACA's plain language and purposes, that one or both of those entities were subject to FACA's requirements. Indeed, this was the sensible distinction drawn in *AAPS*:

> But a consultant may still be properly described as a member of an advisory committee if his involvement and role are *functionally indistinguishable from those of other members*. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a 'consultant' regularly attends and fully participates in working group meetings as if he were a 'member,' he should be regarded as a member. Then his status as a private citizen would disqualify the working group from the section 3(2) exemption for meetings of full-time government officials.

Id. (emphasis added).

While there is no need or justification to address the merits at this early phase of the litigation – since the discovery that respondents take may render the issue moot or, at minimum, help illuminate it – petitioners never explain why the distinction drawn in *AAPS* is not a perfectly sound reading of Congress's intent. Contrary to petitioners' insistence, there is nothing

"in FACA's text," Pet. Br. at 18, that would foreclose application of the statute to a situation where the "involvement and role" of private members are "functionally indistinguishable from those of other members" of a committee. *AAPS*, 997 F.2d at 915.

To the contrary, the statute defines an advisory committee as "any committee" which is "established or utilized by the President" or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government," 5 U.S.C. App. 2 § 3(2), and it excludes from that definition "any committee that is *composed wholly* of full-time, or permanent part-time, officers or employees of the Federal Government." *Id.* at § 3(2)(C)(1) (emphasis added). Accordingly, the language of the statute clearly *supports* the approach adopted in *AAPS*, since, if a non-government participant is serving on a committee in a manner that is "functionally indistinguishable" from other members, 997 F.2d at 915, then, irrespective of whether the government has *acknowledged* their participation, the committee is not, in fact, "composed wholly" of federal "officers or employees."

On the other hand, petitioners' reading of the statute makes no sense. Petitioners argue, circuitously, that the so-called "de facto member doctrine . . . would effectively repeal both FACA's textual exemption for advisory committees made up exclusively of government officials . . . and its requirement that the 'establishment' of a FACA advisory group must be 'specifically authorized . . . by the President, 5 U.S.C. App. 2 § 9(a), at 5." Pet. Br. at 18. Plainly, however if a private party is allowed to participate in an advisory committee "as if he were a 'member,'" *AAPS*, 997 F.2d at 915, then the committee is not "made up exclusively of government officials" and the statutory "exemption" for such committees would be inapplicable. Hence, an inquiry into the *actual* – as opposed to declared – membership of a committee, far from "repealing" the "textual exemption," is a means of honoring the statute's "text" and underlying intent.

Petitioners' reliance on section 9(a) of the statute is similarly unhelpful to their cause. The statutory ban on the establishment

of any advisory committee "unless such establishment is . . . specifically authorized by statute or the President," or is "determined as a matter of formal record, by the head of the agency involved . . . to be in the public interest in connection with the performance of duties imposed on that agency by law," 5 U.S.C. App. 2 § 9(a), does not, on its face, even remotely *address* the question of how "de facto" members of a committee should be treated. If anything, that provision's express "prohibition on unauthorized advisory committees," Pet. Br. at 18, would seem to undercut petitioners' position, since it reinforces the importance of ensuring that the President's or agency head's "official actions in establishing a committee" are complied with, rather than disregarded by, Executive Branch subordinates. *Id.* at 19.

Indeed, petitioners' peculiar position appears to be that the actual operation of a committee may dramatically (and unlawfully) "deviate[] from the official directive of the President" or an agency head, Pet. Br. at 19 – *e.g.*, with regard to the subject matter addressed by the committee, as well as its actual membership – without any opportunity for judicial oversight or relief. Obviously, that would allow even flagrant violations of FACA to go unremedied, simply because they developed after a committee's initial creation. *Cf. National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (declaring that particular recommendations of the Executive Committee of the President's Private Sector Survey on Cost Control "were developed and prepared in violation of the requirements" of FACA because the recommendations did "not fall within the narrow area of cost and management control" for which the committee was originally created and constituted).

Petitioners are also clearly wrong in asserting that the distinction drawn in *AAPS* – *i.e.*, between private parties who have only sporadic involvement with a government-formed committee and, on the other hand, such parties who "regularly

attend[] and fully participate[]" in a committee's work, 997 F.2d at 915 – is not "necessary to address the concerns that led to FACA's enactment." Pet. Br. at 19. For example, if, as respondents have alleged, energy industry officials acted as members of the NEPDG or Working Group or other subgroups– and were thereby allowed to heavily (and covertly) influence the advisory process – that would clearly implicate Congress's overriding interest in addressing the "great danger" in the "unregulated use of advisory committees" where "special interest groups may use their membership on such bodies to promote their private concerns." H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). Indeed, the paradigmatic example of a committee which Congress believed should be regulated through FACA was:

> the Advisory Council on Federal Reports, which was organized . . . at the request of the Office of Management and Budget. When Council members met with government officials to consider a proposed national industrial wastes inventory questionnaire, *only representatives of industry were present. No representatives of conservation, environment, clean water, consumer, or other public interest groups were present.*

Id. (emphasis added).

Accordingly, if discovery were to reveal that energy industry officials with vested interests in the outcome of the NEPDG's work were "functionally indistinguishable" from other members of the NEPDG or Working Group (or other subgroups), then this kind of advisory arrangement would unquestionably raise the core "concerns that led to FACA's enactment." Pet. Br. at 19. In fact, petitioners' own contention, based on the Supreme Court's description of FACA, that "Congress was concerned with certain 'specific ills, above all the wasteful expenditure of public funds for worthless committee meetings *and biased proposals*,'" Pet. Br. at 2 (emphasis added) (quoting *Public Citizen v. Department of Justice*, 491 U.S. 440, 453 (1989)), reinforces the importance of ascertaining whether energy industry representatives were permitted to heavily influence "proposals" for legislative and regulatory changes that would directly benefit their industries. *See also* 5 U.S.C. App. 2 §§ 5(b)(3), (c) (providing that the "President, agency heads, or other Federal officials" shall "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest").[8]

In sum, allowing limited discovery here would afford a factual basis for the lower courts to do precisely what petitioners maintain is necessary – avoid "standardless, amorphous" judicial review, Pet. Br. at 18 – and, instead, as *AAPS* counsels, determine whether FACA's purposes and provisions are implicated based on the actual *evidence* of participation by non-federal employees in the work of the NEPDG or Working Group or other subgroups. On the other hand, it is petitioners who advocate for abstract rulings on sweeping constitutional and other legal issues without any meaningful factual record, and the resolution of which may

---

8. Thus, petitioners' argument – based on a law review article – that FACA compliance cannot be required here because "an advisory committee that does not even acknowledge the participation of outside experts cannot simultaneously use the participation of outside experts to bolster the legitimacy of the advisory committee's conclusions," Pet. Br. at 19, erroneously assumes that Congress was only concerned with the use of "outside experts" for that purpose. Rather, Congress was also gravely concerned that "special interest groups may use their membership on such bodies *to promote their private concerns*," H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972) (emphasis added) – a problem that is obviously *heightened* when such participation is shielded from public scrutiny. Petitioners' reliance on a regulation previously issued by the General Services Administration ("GSA") is also misplaced, *see* Pet. Br. at 14, because this Court, in *Public Citizen*, specifically ruled that GSA's regulations construing FACA are entitled to little, if any, deference. *See* 491 U.S. at 465 n.12.

prove entirely unnecessary when such a record is finally compiled.[9]

---

9. Petitioners also repeatedly, but mistakenly, insist that this Court's ruling in *Public Citizen* somehow supports their position that they should be entirely "immune" from any discovery here. *See* Pet. Br. at 22. *Public Citizen* does not even address the capacity of district courts to compile and consider a factual record *before* deciding whether FACA applies, or constitutionally can apply, to a particular advisory arrangement. To the contrary, in *Public Citizen*, the case was decided on cross-motions for summary judgment in the district court, based on factual materials compiled and submitted by the parties concerning the role played by the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee"), before there was review in this Court. *See Washington Legal Foundation v. United States Dep't of Justice*, 691 F. Supp. 483, 496 (D.D.C. 1988) (granting summary judgment for defendants); *id.* at 486-88 (relying on undisputed material facts submitted by the parties).

Moreover, far from suggesting that the lower courts should refrain from allowing any discovery in order to assess FACA's applicability in particular situations, the Court's reading of the Act in *Public Citizen* actually supports compilation of a factual record. In ruling that FACA did not apply to the ABA Committee, the Court rejected a "literal reading" of what Congress meant by an advisory committee that was "utilized," although not directly "established," by the government. 491 U.S. at 454. Instead, the Court held that a committee created by a non-governmental entity is "utilized" when it is, in fact, being used "'by a department or agency in the same manner as a Government-formed advisory committee'" because it is "amenable to the strict management by" Executive Branch officials. *Id.* at 457 (quoting Executive Order No. 11007). That test for FACA coverage necessitates a case-by-case analysis as to whether there is sufficient "evidence" that Executive Branch officials are engaging in "'strict management'" of a committee created by another entity. *Washington Legal Foundation v. United States Sentencing Commission*, 17 F.3d 1446, 1451 (D.C. Cir. 1994); *see also Food Chemical News v. Young*, 900 F.2d 328, 332-33 (D.C. Cir. 1990).

III. PETITIONERS' ARGUMENT THAT FACA CANNOT BE APPLIED TO THE NEPDG WITHOUT VIOLATING THE SEPARATION OF POWERS IS PREMATURE, AND BASED ON A MISREADING OF THIS COURT'S PRECEDENTS.

Even assuming that FACA applied to the NEPDG or subgroups because they contained non-federal members, "petitioners contend that because the exercise of the President's authority under the Opinions and Recommendations Clause at issue in this case involves powers expressly committed by the Constitution to the Executive, Congress lacks *any authority* to regulate the President's exercise of those powers." Pet. Br. at 41 (emphasis added); *id.* at 28 (arguing that application of FACA would "interfere with core Executive Branch functions"). Plainly, that position, if accepted, would mean that FACA could not be constitutionally applied to *any* advisory committee that the Executive Branch does not wish to subject to the Act's requirements.

For example, under the government's rigid reading of the Recommendations Clause, FACA could not be applied to any committee whose recommendations might bear on legislative proposals. As explained by Judge Silberman in *AAPS*:

> Whenever an executive branch group considers policy initiatives, it discusses interchangeably new legislation, executive orders, or other administrative directives. Thus, virtually any time an advisory group meets to discuss a problem, it will implicate the Recommendation Clause, from which all executive branch authority to recommend legislation derives. *Accordingly, if the application of FACA to groups advising the President or anyone else in the executive branch were constitutionally problematic, insofar as those groups were advising on proposed legislation, FACA would be problematic with regard to virtually all policy advice. Under that reasoning FACA would be constitutionally suspect on its face*[].

997 F.2d at 908 (emphasis added).

Similarly, if the Opinion Clause is construed as strictly forbidding any Congressional regulation of the process by which the President obtains advice from *any* source, as the government insists, Pet. Br. at 30-32, then FACA is clearly unconstitutional *in its entirety* for that reason as well. Even further, because every committee formed to advise the Executive Branch will, by definition, aid in the exercise of *some* constitutional power vested in the Executive Branch – whether it be the Recommendations or Opinion Clauses, the general responsibility to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, or some other constitutional provision – the government's position is, in practical effect, an argument that FACA should be deemed unconstitutional as applied to *any* committee that advises the Executive Branch, regardless of its subject matter or composition. Indeed, petitioners' contention that Congress cannot "'inquire into matters which are within the exclusive province' of the Executive" and hence "*cannot empower the public to force disclosure of such matters*," Pet. Br. at 31 (internal citation omitted) (emphasis added), would, if accepted by the Court, not only compel wholesale invalidation of FACA, but also the FOIA, the Sunshine Act, and a host of other statutes that require the Executive Branch to operate with a modicum of openness. *See also* 42 U.S.C. § 7607(d)(4) (requiring public disclosure of certain air quality rulemakings).

There is no conceivable reason for the Court even to *consider* this novel and far-reaching argument before the lower courts have had an opportunity to resolve this case on the merits. In any event, this Court has never adopted an approach to resolving separation of powers issues that even arguably resembles the sweeping, categorical approach espoused by petitioners. To the contrary, in evaluating the constitutionality of similar legislative schemes, including "open government" statutes, the Court has employed a pragmatic balancing test. Thus, in *Nixon v. Administrator, General Services*, 433 U.S. 425 (1977), in upholding the constitutionality of a statute

providing for public access to some of President Nixon's materials, the Court held that:

> in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Id. at 443; *see also Morrison v. Olson*, 487 U.S. 654, 692-93 (1988); *Common Cause v. NRC*, 674 F.2d 921, 935 (D.C. Cir. 1982) (applying balancing analysis to application of Sunshine Act and rejecting rigid approach to separation of powers).

As both the district court and court of appeals have held, the appropriate context in which to apply the balancing test dictated by this Court's precedents – as well as to make a threshold determination of whether FACA even applies to the advisory arrangement at issue – is *after*, not before, the development of a factual record concerning the actual composition of the NEPDG and its subgroups. For example, if discovery supported an argument that the lower-level Working Group should be deemed subject to FACA, but not the NEPDG itself, that would obviously have a bearing on the extent to which FACA's application would intrude on Executive Branch functions. Indeed, under that scenario, it is not clear how the Opinion Clause would even be implicated, since it applies only to the "Opinion, in writing, of the *principal Officer* in each of the Departments." U.S. Const., Art. II, § 2 (emphasis added). Similarly, the compilation of a factual record would help the lower courts assess the extent to which the Recommendations Clause is actually implicated here, especially since the vast majority of the NEPDG recommendations do not specifically call on

Congress to adopt new legislation but, rather, call for actions to be taken entirely within the Executive Branch itself. *See, e.g.*, 66 Fed. Reg. 34,192 (June 27, 2001) (implementing NEPDG recommendation calling for review of New Source Review regulations); Executive Order 13212 (May 18, 2001) (ordering "Actions to Expedite Energy-Related Projects," as recommended by NEPDG).

Further factual development would also shed light on the other side of the balancing equation. As suggested previously, petitioners arrive at the conclusion that "Congress's legitimate interests are *non-existent*" with regard to FACA's potential application here, Pet. Br. at 34 (emphasis added), only because petitioners ignore entirely Congress's important interest in addressing the "great danger" in the "unregulated use of advisory committees" where "special interest groups may use their membership on such bodies to promote their private concerns," rather than the public good. H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). Hence, if discovery reveals, as respondents allege, that the advisory process at issue *was* dominated by "special interest" influence from energy industry representatives, then that would reinforce a "need to promote objectives within the constitutional authority of Congress." *Nixon*, 433 U.S. at 443; *see also id.* at 445 (the "regulation of materials generated in the Executive Branch" through the open government laws "has never been considered invalid as an invasion of [Executive Branch] autonomy"). Once again, however, judicial consideration of that and the other issues raised by petitioners bearing on FACA's constitutionality should await further factual and legal development.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

SHARON BUCCINO
NATURAL RESOURCES
DEFENSE COUNCIL
Suite 400
1200 New York Ave., N.W.
Washington, D.C. 20005

ERIC R. GLITZENSTEIN
Counsel of Record
HOWARD M. CRYSTAL
MEYER & GLITZENSTEIN
Suite 700
1601 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 588-5206

Attorneys for Amicus Curiae

Amicus Curiae Brief Unavailable for Filming at This Time

(13)

SUPREME COURT OF THE UNITED STATES

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03–475. Decided March 18, 2004.

Memorandum of JUSTICE SCALIA.

I have before me a motion to recuse in these cases consolidated below. The motion is filed on behalf of respondent Sierra Club. The other private respondent, Judicial Watch, Inc., does not join the motion and has publicly stated that it "does not believe the presently-known facts about the hunting trip satisfy the legal standards requiring recusal." Judicial Watch Statement 2 (Feb. 13, 2004) (available in Clerk of Court's case file). (The District Court, a nominal party in this mandamus action, has of course made no appearance.) Since the cases have been consolidated, however, recusal in the one would entail recusal in the other.

I

The decision whether a judge's impartiality can "'reasonably be questioned'" is to be made in light of the facts as they existed, and not as they were surmised or reported. See *Microsoft Corp.* v. *United States*, 530 U. S. 1301, 1302 (2000) (REHNQUIST, C. J.) (opinion respecting recusal). The facts here were as follows:

For five years or so, I have been going to Louisiana during the Court's long December-January recess, to the duck-hunting camp of a friend whom I met through two hunting companions from Baton Rouge, one a dentist and

the other a worker in the field of handicapped rehabilitation. The last three years, I have been accompanied on this trip by a son-in-law who lives near me. Our friend and host, Wallace Carline, has never, as far as I know, had business before this Court. He is not, as some reports have described him, an "energy industry executive" in the sense that summons up boardrooms of ExxonMobil or Con Edison. He runs his own company that provides services and equipment rental to oil rigs in the Gulf of Mexico.

During my December 2002 visit, I learned that Mr. Carline was an admirer of Vice President Cheney. Knowing that the Vice President, with whom I am well acquainted (from our years serving together in the Ford administration), is an enthusiastic duck-hunter, I asked whether Mr. Carline would like to invite him to our next year's hunt. The answer was yes; I conveyed the invitation (with my own warm recommendation) in the spring of 2003 and received an acceptance (subject, of course, to any superseding demands on the Vice President's time) in the summer. The Vice President said that if he did go, I would be welcome to fly down to Louisiana with him. (Because of national security requirements, of course, he must fly in a Government plane.) That invitation was later extended—if space was available—to my son-in-law and to a son who was joining the hunt for the first time; they accepted. The trip was set long before the Court granted certiorari in the present case, and indeed before the petition for certiorari had even been filed.

We departed from Andrews Air Force Base at about 10 a.m. on Monday, January 5, flying in a Gulfstream jet owned by the Government. We landed in Patterson, Louisiana, and went by car to a dock where Mr. Carline met us, to take us on the 20-minute boat trip to his hunting camp. We arrived at about 2 p.m., the 5 of us joining about 8 other hunters, making about 13 hunters in all; also present during our time there were about 3 members

of Mr. Carline's staff, and, of course, the Vice President's staff and security detail. It was not an intimate setting. The group hunted that afternoon and Tuesday and Wednesday mornings; it fished (in two boats) Tuesday afternoon. All meals were in common. Sleeping was in rooms of two or three, except for the Vice President, who had his own quarters. Hunting was in two- or three-man blinds. As it turned out, I never hunted in the same blind with the Vice President. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them—walking to or from a boat, perhaps, or going to or from dinner. Of course we said not a word about the present case. The Vice President left the camp Wednesday afternoon, about two days after our arrival. I stayed on to hunt (with my son and son-in-law) until late Friday morning, when the three of us returned to Washington on a commercial flight from New Orleans.

II

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." Motion to Recuse 8. That might be sound advice if I were sitting on a Court of Appeals. But see *In re Aguinda*, 241 F. 3d 194, 201 (CA2 2000). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "[W]e do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnec-

essary recusal impairs the functioning of the Court." (Available in Clerk of Court's case file.) Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.

Even so, recusal is the course I must take—and will take—when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term. See *Elk Grove Unified School District* v. *Newdow*, 540 U. S. ___ (cert. granted, Oct. 14, 2003). I believe, however, that established principles and practices do not require (and thus do not permit) recusal in the present case.

A

My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 28 U. S. C. §455(a). Why would that result follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

A rule that required Members of this Court to remove themselves from cases in which the official actions of

friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive. John Quincy Adams hosted dinner parties featuring such luminaries as Chief Justice Marshall, Justices Johnson, Story, and Todd, Attorney General Wirt, and Daniel Webster. 5 Memoirs of John Quincy Adams 322–323 (C. Adams ed. 1969) (Diary Entry of Mar. 8, 1821). Justice Harlan and his wife often "'stopped in'" at the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. M. Harlan, Some Memories of a Long Life, 1854–1911, p. 99 (2001). Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. 2 Memoirs of Herbert Hoover 327 (1952). Justice Douglas was a regular at President Franklin Roosevelt's poker parties; Chief Justice Vinson played poker with President Truman. J. Simon, Independent Journey: The Life of William O. Douglas 220–221 (1980); D. McCullough, Truman 511 (1992). A no-friends rule would have disqualified much of the Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), the case that challenged President Truman's seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him. A no-friends rule would surely have required Justice Holmes's recusal in *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), the case that challenged President Theodore Roosevelt's trust-busting initiative. See S. Novick, Honorable Justice: The Life of Oliver Wendell Holmes 264 (1989) ("Holmes and Fanny dined at the White House every week or two . . .").

It is said, however, that this case is different because the federal officer (Vice President Cheney) is actually a

named party. That is by no means a rarity. At the beginning of the current Term, there were before the Court (excluding habeas actions) no fewer than 83 cases in which high-level federal Executive officers were named in their official capacity—more than 1 in every 10 federal civil cases then pending. That an officer is named has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government. That is why federal law provides for *automatic substitution* of the new officer when the originally named officer has been replaced. See Federal Rule of Civil Procedure 25(d)(1); Federal Rule of Appellate Procedure 43(c)(2); this Court's Rule 35.3. The caption of Sierra Club's complaint in this action designates as a defendant "Vice President Richard Cheney, *in his official capacity* as Vice President of the United States and Chairman of the National Energy Policy Development Group." App. 139 (emphasis added). The body of the complaint repeats (in paragraph 6) that "Defendant Richard Cheney is sued *in his official capacity* as the Vice President of the United States and Chairman of the Cheney Energy Task Force." *Id.*, at 143 (emphasis added). Sierra Club has *relied* upon the fact that this is an official-action rather than a personal suit as a basis for denying the petition. It asserted in its brief in opposition that if there was no presidential immunity from discovery in *Clinton* v. *Jones*, 520 U. S. 681 (1997), which was a private suit, "[s]urely . . . the Vice President and subordinate White House officials have no greater immunity claim here, especially when the lawsuit relates to their official actions while in office and the primary relief sought is a declaratory judgment." Brief in Opposition 13.

Richard Cheney's name appears in this suit only because he was the head of a Government committee that allegedly did not comply with the Federal Advisory Committee Act (FACA), 5 U. S. C. App. §2, p. 1, and because he may, by reason of his office, have custody of some or all of the Government documents that the plaintiffs seek. If some other person were to become head of that committee or to obtain custody of those documents, the plaintiffs would name that person and Cheney would be dismissed. Unlike the defendant in *United States* v. *Nixon*, 418 U. S. 683 (1974), or *Clinton* v. *Jones*, *supra*, Cheney is represented here, not by his personal attorney, but by the United States Department of Justice in the person of the Solicitor General. And the courts at all levels have referred to his arguments as (what they are) the arguments of "the government." See *In re Cheney*, 334 F. 3d 1096, 1100 (CADC 2003); *Judicial Watch, Inc.* v. *Nat. Energy Policy Development Group*, 219 F. Supp. 2d 20, 25 (DC 2002).

The recusal motion, however, asserts the following:

> "Critical to the issue of Justice Scalia's recusal is understanding that this is not a run-of-the-mill legal dispute about an administrative decision. . . . Because his own conduct is central to this case, the Vice President's 'reputation and his integrity are on the line.' (Chicago Tribune.)" Motion to Recuse 9.

I think not. Certainly as far as the legal issues immediately presented to me are concerned, this *is* "a run-of-the-mill legal dispute about an administrative decision." I am asked to determine what powers the District Court possessed under FACA, and whether the Court of Appeals should have asserted mandamus or appellate jurisdiction

over the District Court.[1] Nothing this Court says on those subjects will have any bearing upon the reputation and integrity of Richard Cheney. Moreover, even if this Court affirms the decision below and allows discovery to proceed in the District Court, the issue that would ultimately present itself *still* would have no bearing upon the reputation and integrity of Richard Cheney. That issue would be, quite simply, whether some private individuals were *de facto* members of the National Energy Policy Development Group (NEPDG). It matters not whether they were caused to be so by Cheney or someone else, or whether Cheney was even aware of their *de facto* status; if they *were de facto* members, then (according to D. C. Circuit law) the records and minutes of NEPDG must be made public.

The recusal motion asserts, however, that Richard Cheney's "reputation and his integrity are on the line" because

> "respondents have alleged, *inter alia*, that the Vice President, as the head of the Task Force and its subgroups, was responsible for the involvement of energy industry executives in the operations of the Task Force, as a result of which the Task Force and its subgroups became subject to FACA." *Ibid.*

---

[1] The Questions Presented in the petition, and accepted for review, are as follows:

"1. Whether the Federal Advisory Committee Act (FACA), 5 U. S. C. App. 1, §§1 *et seq.*, can be construed . . . to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation." Pet. for Cert. (I).

As far as Sierra Club's *complaint* is concerned, it simply is not true that Vice President Cheney is singled out as having caused the involvement of energy executives. But even if the allegation had been made, it would be irrelevant to the case. FACA assertedly requires disclosure if there were private members of the task force, *no matter who* they were—"energy industry executives" or Ralph Nader; and *no matter who* was responsible for their membership—the Vice President or no one in particular. I do not see how the Vice President's "reputation and integrity are on the line" any more than the agency head's reputation and integrity are on the line in virtually all official-action suits, which accuse his agency of acting (to quote the Administrative Procedure Act) "arbitrar[ily], capricious[ly], [with] an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706(2)(A). Beyond that always-present accusation, there is nothing illegal or immoral about making "energy industry executives" members of a task force on energy; some people probably think it would be a good idea. If, in doing so, or in allowing it to happen, the Vice President went beyond his assigned powers, that is no worse than what every agency head has done when his action is judicially set aside.

To be sure, there could be political consequences from disclosure of the fact (if it be so) that the Vice President favored business interests, and especially a sector of business with which he was formerly connected. But political consequences are not my concern, and the possibility of them does not convert an official suit into a private one. That possibility exists to a greater or lesser degree in virtually all suits involving agency action. To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do. It seems to me quite wrong (and quite impossible) to make recusal depend upon what degree of political damage a particular case can be

expected to inflict.

In sum, I see nothing about this case which takes it out of the category of normal official-action litigation, where my friendship, or the appearance of my friendship, with one of the named officers does not require recusal.

B

The recusal motion claims that "the fact that Justice Scalia and his daughter [sic] were the Vice President's guest on Air Force Two on the flight down to Louisiana" means that I "accepted a sizable gift from a party in a pending case," a gift "measured in the thousands of dollars." Motion to Recuse 6.

Let me speak first to the value, though that is not the principal point. Our flight down cost the Government nothing, since space-available was the condition of our invitation. And, though our flight down on the Vice President's plane was indeed free, since we were not returning with him we purchased (because they were least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights. In other words, none of us saved a cent by flying on the Vice President's plane. The purpose of going with him was not saving money, but avoiding some inconvenience to ourselves (being taken by car from New Orleans to Morgan City) and considerable inconvenience to our friends, who would have had to meet our plane in New Orleans, and schedule separate boat trips to the hunting camp, for us and for the Vice President's party. (To be sure, flying on the Vice President's jet was more comfortable and more convenient than flying commercially; that accommodation is a matter I address in the next paragraph.)[2]

[2]As my statement of the facts indicated, by the way, my daughter did not accompany me. My married son and son-in-law were given a ride—not because they were relatives and as a favor to me; but because they were other hunters leaving from Washington, and as a favor to them (and to those who would have had to go to New Orleans to meet them). Had they been unrelated invitees to the hunt, the same would undoubtedly have occurred. Financially, the flight was worth as little to them as it was to me.

The principal point, however, is that social courtesies, provided at Government expense by officials whose only business before the Court is business in their official capacity, have not hitherto been thought prohibited. Members of Congress and others are frequently invited to accompany Executive Branch officials on Government planes, where space is available. That this is not the sort of gift thought likely to affect a judge's impartiality is suggested by the fact that the Ethics in Government Act of 1978, 5 U. S. C. App. §101 *et seq.*, p. 38, which requires annual reporting of transportation provided or reimbursed, excludes from this requirement transportation provided by the United States. See §109(5)(C); Committee on Financial Disclosure, Administrative Office of the U. S. Courts, Financial Disclosure Report: Filing Instructions for Judicial Officers and Employees, p. 25 (Jan. 2003). I daresay that, at a hypothetical charity auction, much more would be bid for dinner for two at the White House than for a one-way flight to Louisiana on the Vice President's jet. Justices accept the former with regularity. While this matter was pending, Justices and their spouses were invited (*all* of them, I believe) to a December 11, 2003, Christmas reception at the residence of the Vice President—which included an opportunity for a photograph with the Vice President and Mrs. Cheney. Several of the Justices attended, and in doing so they were fully in accord with the proprieties.

III

When I learned that Sierra Club had filed a recusal

motion in this case, I assumed that the motion would be replete with citations of legal authority, and would provide some instances of cases in which, because of activity similar to what occurred here, Justices have recused themselves or at least have been asked to do so. In fact, however, the motion cites only two Supreme Court cases assertedly relevant to the issue here discussed,[3] and nine Court of Appeals cases. Not a single one of these even involves an official-action suit.[4] And the motion gives not a single instance in which, under even remotely similar circumstances, a Justice has recused or been asked to recuse. Instead, the Argument section of the motion consists almost entirely of references to, and quotations from, newspaper editorials.

---

[3]The motion cites a third Supreme Court case, *Public Citizen* v. *Department of Justice*, 491 U. S. 440 (1989), as a case involving FACA in which I recused myself. It speculates (1) that the reason for recusal was that as Assistant Attorney General for the Office of Legal Counsel I had provided an opinion which concluded that applying FACA to presidential advisory committees was unconstitutional; and asserts (2) that this would also be grounds for my recusal here. My opinion as Assistant Attorney General addressed the precise question presented in *Public Citizen:* whether the American Bar Association's Standing Committee on Federal Judiciary, which provided advice to the President concerning judicial nominees, could be regulated as an "advisory committee" under FACA. I concluded that my withdrawal from the case was required by 28 U. S. C. §455(b)(3), which mandates recusal where the judge "has served in governmental employment and in such capacity . . . expressed an opinion concerning the merits of the particular case in controversy." I have never expressed an opinion concerning the merits of the present case.

[4]*United States* v. *Murphy*, 768 F. 2d 1518 (CA7 1985), at least involved a judge's going on vacation—but not with the named defendant in an official-action suit. The judge had departed for a vacation with the prosecutor of Murphy's case, immediately after sentencing Murphy. Obviously, the prosecutor is personally involved in the outcome of the case in a way that the nominal defendant in an official-action suit is not.

The core of Sierra Club's argument is as follows:

> "Sierra Club makes this motion because . . . damage [to the integrity of the system] is being done right now. As of today, 8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest have called on Justice Scalia to step aside . . . . Of equal import, there is no counterbalance or controversy: not a single newspaper has argued against recusal. Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned. These facts more than satisfy Section 455(a), which mandates recusal merely when a Justice's impartiality 'might reasonably be questioned.'" Motion to Recuse 3–4.

The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it.

The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right. The length of our hunting trip together was said to be several days (San Francisco Chronicle), four days (Boston Globe), or nine days (San Antonio Express-News). We spent about 48 hours together at the hunting camp. It was asserted that the Vice President and I "spent time alone in the rushes," "huddled together in a Louisiana marsh," where we had "plenty of time . . . to talk privately" (Los Angeles Times); that we "spent . . . quality time bonding together in a duck blind" (Atlanta Journal-Constitution); and that "[t]here is simply no reason to think these two did not discuss the pending case" (Buffalo News). As I have described, the Vice President and I were never in the same blind, and never discussed the case.

(Washington officials know the rules, and know that discussing with judges pending cases—their own or anyone else's—is forbidden.) The Palm Beach Post stated that our "transportation was provided, appropriately, by an oil services company," and Newsday that a "private jet . . . whisked Scalia to Louisiana." The Vice President and I flew in a Government plane. The Cincinnati Enquirer said that "Scalia was Cheney's guest at a private duck-hunting camp in Louisiana." Cheney and I were Wallace Carline's guest. Various newspapers described Mr. Carline as "an energy company official" (Atlanta Journal-Constitution), an "oil industrialist," (Cincinnati Enquirer), an "oil company executive" (Contra Costa Times), an "oilman" (Minneapolis Star Tribune), and an "energy industry executive" (Washington Post). All of these descriptions are misleading.

And these are just the inaccuracies pertaining to the *facts*. With regard to the *law*, the vast majority of the editorials display no recognition of the central proposition that a federal officer is not ordinarily regarded to be a personal party in interest in an official-action suit. And those that do display such recognition facilely assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney's reputation and integrity) is ground for recusal. Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question. It is well established that the recusal inquiry must be "made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances*." *Microsoft Corp.* v. *United States*, 530 U. S. 1301, 1302 (2000) (REHNQUIST, C. J.) (opinion respecting recusal) (emphases added) (citing *Liteky* v. *United States*, 510 U. S. 540, 548 (1994)).

IV

While Sierra Club was apparently unable to summon

forth a single example of a Justice's recusal (or even motion for a Justice's recusal) under circumstances similar to those here, I have been able to accomplish the seemingly more difficult task of finding a couple of examples establishing the negative: that recusal or motion for recusal did *not* occur under circumstances similar to those here.

Justice White and Robert Kennedy

The first example pertains to a Justice with whom I have sat, and who retired from the Court only 11 years ago, Byron R. White. Justice White was close friends with Attorney General Robert Kennedy from the days when White had served as Kennedy's Deputy Attorney General. In January 1963, the Justice went on a skiing vacation in Colorado with Robert Kennedy and his family, Secretary of Defense Robert McNamara and his family, and other members of the Kennedy family. Skiing Not The Best; McNamara Leaves Colorado, Terms Vacation "Marvelous," Denver Post, Jan. 2, 1963, p. 22; D. Hutchinson, The Man Who Once Was Whizzer White 342 (1998). (The skiing in Colorado, like my hunting in Louisiana, was not particularly successful.) At the time of this skiing vacation there were pending before the Court at least two cases in which Robert Kennedy, in his official capacity as Attorney General, was a party. See *Gastelum-Quinones* v. *Kennedy*, 374 U. S. 469 (1963); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963). In the first of these, moreover, the press might have said, as plausibly as it has said here, that the reputation and integrity of the Attorney General were at issue. There the Department of Justice had decreed deportation of a resident alien on grounds that he had been a member of the Communist Party. (The Court found that the evidence adduced by the Department was inadequate.)

Besides these cases naming Kennedy, another case pending at the time of the skiing vacation was argued to

the Court *by Kennedy* about two weeks later. See *Gray* v. *Sanders*, 372 U. S. 368 (1963). That case was important to the Kennedy administration, because by the time of its argument everybody knew that the apportionment cases were not far behind, and *Gray* was a significant step in the march toward *Reynolds* v. *Sims*, 377 U. S. 533 (1964). When the decision was announced, it was front-page news. See High Court Voids County Unit Vote, N. Y. Times, Mar. 19, 1963, p. 1, col. 2; Georgia's Unit Voting Voided, Washington Post, Mar. 19, 1963, p. A1, col. 5. Attorney General Kennedy argued for affirmance of a three-judge District Court's ruling that the Georgia Democratic Party's county-unit voting system violated the one-person, one-vote principle. This was Kennedy's only argument before the Court, and it certainly put "on the line" his reputation as a lawyer, as well as an important policy of his brother's administration.

Justice Jackson and Franklin Roosevelt

The second example pertains to a Justice who was one of the most distinguished occupants of the seat to which I was appointed, Robert Jackson. Justice Jackson took the recusal obligation particularly seriously. See, *e.g.*, *Jewell Ridge Coal Corp.* v. *United Mine Workers*, 325 U. S. 897 (1945) (Jackson, J., concurring in denial of rehearing) (oblique criticism of Justice Black's decision not to recuse himself from a case argued by his former law partner). Nonetheless, he saw nothing wrong with maintaining a close personal relationship, and engaging in "quite frequen[t]" socializing with the President whose administration's acts came before him regularly. R. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 74 (J. Barrett ed. 2003).

In April 1942, the two "spent a weekend on a very delightful house party down at General Watson's in Charlottesville, Virginia. I had been invited to ride down with the President and to ride back with him." *Id.*, at 106 (footnote omitted). Pending at the time, and argued the next month, was one of the most important cases concerning the scope of permissible federal action under the Commerce Clause, *Wickard* v. *Filburn*, 317 U. S. 111 (1942). Justice Jackson wrote the opinion for the Court. Roosevelt's Secretary of Agriculture, rather than Roosevelt himself, was the named federal officer in the case, but there is no doubt that it was important to the President.

I see nothing wrong about Justice White's and Justice Jackson's socializing—including vacationing and accepting rides—with their friends. Nor, seemingly, did anyone else at the time. (The Denver Post, which has been critical of me, reported the White-Kennedy-McNamara skiing vacation with nothing but enthusiasm.) If friendship is basis for recusal (as it assuredly is when friends are sued personally) then activity which suggests close friendship must be avoided. But if friendship is *no* basis for recusal (as it is not in official-capacity suits) social contacts that do no more than evidence that friendship suggest no impropriety whatever.

Of course it can be claimed (as some editorials have claimed) that "times have changed," and what was once considered proper—even as recently as Byron White's day—is no longer so. That may be true with regard to the earlier rare phenomenon of a Supreme Court Justice's serving as advisor and confidant to the President—though that activity, so incompatible with the separation of powers, was not widely known when it was occurring, and can hardly be said to have been generally approved before it was properly abandoned. But the well-known and constant practice of Justices' enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch has *not* been abandoned, and ought not

to be.

V

Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse. See *Microsoft*, 530 U. S., at 1302. That alone is conclusive; but another consideration moves me in the same direction: Recusal would in my judgment harm the Court. If I were to withdraw from this case, it would be because some of the press has argued that the Vice President would suffer political damage *if* he should lose this appeal, and *if*, on remand, discovery should establish that energy industry representatives were *de facto* members of NEPDG—and because some of the press has elevated that possible political damage to the status of an impending stain on the reputation and integrity of the Vice President. But since political damage often comes from the Government's losing official-action suits; and since political damage can readily be characterized as a stain on reputation and integrity; recusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.

My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before—visited not at his invitation, but at his predecessor's. See New Trip Trouble for Scalia, Feb. 28, 2004, p. B22. The same paper has asserted that it was improper for me to speak at a dinner honoring Cardinal Bevilaqua given by the Urban Family Council of Philadelphia because (according to the Times's false report)[5] that organization was engaged in litigation seeking to prevent same-sex civil unions, and I had before me a case presenting the question (whether same-sex civil unions were lawful?—no) whether homosexual sodomy could constitutionally be *criminalized*. See *Lawrence* v. *Texas*, 539 U. S. ___ (2003). While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find footfaults.

* * *

As I noted at the outset, one of the private respondents in this case has not called for my recusal, and has ex-

[5]The Times's reporter had interviewed the former President of the Urban Family Council, who told him categorically that the Council was neither a party to, nor had provided financial support for, the civil-union litigation. The filed papers in the case, publicly available, *showed* that the Council was not a party. The Los Angeles Times nonetheless devoted a lengthy front-page article to the point that (in the words of the lead sentence) "Justice Antonin Scalia gave a keynote dinner speech in Philadelphia for an advocacy group waging a legal battle against gay rights." Serrano and Savage, Scalia Addressed Advocacy Group Before Key Decision, Mar. 8, 2004, at A1. Five days later, in a weekend edition, the paper printed (at the insistence of the Council) a few-line retraction acknowledging that this asserted fact was wrong—as though it was merely one incidental fact in a long piece, rather than the central fact upon which the long piece was based, and without which *there was no story*. See For the Record, Mar. 13, 2004, at A2. Other inaccurate facts and insinuations in the article, brought to the paper's attention by the Council, were not corrected. See e-mail from Betty Jean Wolfe, President, Urban Family Council, to Richard Serrano, Los Angeles Times (Mar. 8, 2004) (available in Clerk of Court's case file).

pressed confidence that I will rule impartially, as indeed I will. Counsel for the other private respondent seek to impose, it seems to me, a standard regarding friendship, the appearance of friendship, and the acceptance of social favors, that is more stringent than what they themselves observe. Two days before the brief in opposition to the petition in this case was filed, lead counsel for Sierra Club, a friend, wrote me a warm note inviting me to come to Stanford Law School to speak to one of his classes. (Available in Clerk of Court's case file.) (Judges teaching classes at law schools normally have their transportation and expenses paid.) I saw nothing amiss in that friendly letter and invitation. I surely would have thought otherwise if I had applied the standards urged in the present motion.

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which *he* is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here—even to the point of becoming (as the motion cruelly but accurately states) "fodder for late-

night comedians." Motion to Recuse 6. If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot. The motion is

Denied.